TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1910.

No. [redacted] 59.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

J. A. TURNIPSEED, ADMINISTRATOR OF THE ESTATE OF RAY HICKS AND MARY ALICE HICKS AND NEXT FRIEND OF MINNIE MARY HICKS, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED AUGUST 20, 1908.

(21,310.)

(21,310.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 241.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

J. A. TURNIPSEED, ADMINISTRATOR OF THE ESTATE OF RAY HICKS AND MARY ALICE HICKS AND NEXT FRIEND OF MINNIE MARY HICKS, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1909.

1 In the Circuit Court of Newton County, State of Mississippi.

No. 950.

MARY ALICE HICKS, Administratrix,
vs.
MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY.

No. 951.

MARY ALICE HICKS et al.
vs.
MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY.

Bill of Exceptions.

Be it remembered that there was held a regular term of the circuit court in and for Newton County, State of Mississippi, beginning on the 4th Monday of January, 1907, and amoung other causes coming — to be heard at the said term were Mary Alice Hicks, Administratrix, vs. Mobile, Jackson & Kansas City Railroad Company No. 950 on the docket of the said court, and cause No. 951, Mary Alice Hicks et al. vs. Mobile, Jackson & Kansas City Railroad Company, and Hon. J. R. Byrd, the regular Judge of the district embracing Newton County, being disqualified, Hon. Geo. H. Ethridge was appointed by the Governor of the state to try the said causes; and on the 5th day of February, 1907 before said special judge, the following proceedings were had in the said causes:

Counsel for plaintiffs in the two said causes moved the co-rt to consolidate them and try them together, his said motion being in words and figures as follows:

Circuit Court of Newton County, Jan. Term, 1907.

No. 950.

MARY ALICE HICKS, Adm'r'x,
vs.
MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY.

No. 951.

MARY ALICE HICKS et al.
vs.
MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY.

2 Comes the plaintiffs in above causes and shows to the court that the cause of action in the two suits is the same, the suit is to recover for the same injury to and death of Ray Hicks,

the defendant is the same, counsel on both sides the same in each case, and the beneficial parties in interest as plaintiffs identical, and they move that the suits be consolidated or tried together, the declaration in suit No. 950 being taken as a count in the consolidated suit.

ALEXANDER & ALEXANDER,
For Pl'ffs.

Filed Feb. 5th 1907.
DAVIS PACE, *Clerk.*

The defendants by its attorneys resisted the said motion, and the court heard the argument for and against it and then sustained the same in the following order:

No. 950.

MARY ALICE HICKS, Adm'r'x,
vs.
M., J. & K. C. R. R. Co.

No. 951.

MARY ALICE HICKS et al.
vs.
M., J. & K. C. R. R. Co.

On motion of plaintiffs in above cases it is ordered that, for the purpose of trial, the two causes be consolidated, the declaration in No. 950, in so far as it sets out the causes of injury to be treated as a count in the consolidated suits; this motion was resisted by attorneys for defendant and to the action of the court in sustaining, the defendant by its attorneys then and there excepted.

To which action of the court sustaining the motion to consolidate the defendant by its attorneys then and there excepted.

Thereupon a jury was empaneled and both causes were put on trial at the same time. The plaintiffs then read their declarations to the jury, which declarations are in words and figures as follows, to wit:

In the Circuit Court of Newton County, Mississippi, to July Term, 1906.

No. 950.

MARY ALICE HICKS, Administratrix,
vs.
M., J. & K. C. R. R. Co.

3

Declaration.

Plaintiff, Mary Alice Hicks, Administratrix of Ray Hicks, deceased, by attorneys, brings this action against the Mobile Jackson

& Kansas City R. R. Co., and, for cause of action, states the following:

The Mobile Jackson & Kansas City Railroad Company is a corporation chartered and organized under the laws of this state and operating a line of railroad, a part of which lies in Newton County, Mississippi.

On October the 28th, 1905, the said Ray Hicks was in the employ of the defendant Company as foreman of a section crew and, together with his crew, was at work on defendant's railroad between Decatur Junction in said county and Stratton, the immediate place of their work or employment being near a bridge over Dry creek.

About twelve o'clock noon of said day, the said Ray Hicks, with the members of his section gang, having just stopped for dinner, was standing or sitting near the track, when a freight train of the defendant company running north approached at a very rapid rate of speed to-wit: Thirty or forty miles an hour, and when it came near the place where the said Hicks was, three or four box cars in said train were derailed and one of them fell or was thrown upon Mr. Hicks, crushing him into the ground and horribly mutilating and mangling his body, and causing injuries from which he died.

The train was made up of seven box cars, one of which was empty, one caboose and one passenger coach, together with the locomotive and tender. The locomotive was in charge of an engineer, one Boyd. The railroad was newly built and but recently in operation. Indeed the entire line had not been completed and the track for that reason was not smooth, secure and safe like that of a railroad which has been well ballasted and long in use. The track for a con-iderable distance before reaching the place of derailment was down grade,

but at the place of derailment was level. The said train
4 while a freight train, operated by the crew of a freight train,
yet had attached to it for that particular run a passenger coach filled with passengers, and the train was considerably behind time.

The cause of the derailment, and consequent injury to and death of the said Hicks, was the willful carelessness and negligence and recklessness of the engineer in charge of the locomotive in running at a rate of speed that was very dangerous and unsafe—a rate of speed far in excess of the schedule rate of speed or the rate permitted under the rules of the company, especially dangerous in view of the fact that the track was newly constructed and not ballasted, and the further fact that the said engineer grossly and carelessly and recklessly, while the train was running at this dangerous rapid rate of speed, suddenly checked the speed of the locomotive. The result of this rapid speed and consequence momentum of the train and its sudden checking was that a box car near the middle of the train was caused to jump from the track, pulling with it two or three other box cars, one of which fell upon the said Hicks in the manner above stated, causing his injury and death.

The said engineer was at the time a servant of the defendant

company, engaged in another department of labor from that of the party injured and engaged about a different piece of work.

The said Hicks being thus, as stated, horribly crushed and mangled, was taken to the hospital, in Hattiesburg where, after suffering intense — indescribable agony in body and mind, he lingered for several days and died. He was a young man about thirty years of age, physically strong, sound and healthy, sober and industrious, having the expectancy of life of a man of his age and physical condition and was earning more than one hundred dollars a month, and supported in comfort his wife and his four children, comprising his family. He died intestate. His children were and are Nettie Mary Hicks, age 8; Austin Leon Hicks, age 6; Alice Rea Hicks, age 4; and Sarah Elizabeth Hicks, age 2; and these with plaintiff were solely dependent on him for a support. Mary Alice Hicks, the plaintiff is 27 years of age, and the expectancy of all these distributees was equal to, if not greater than, the expectancy of the deceased. After the death of her said husband, plaintiff, his wife, was duly appointed administratrix of his estate by the chancery court of Newton County, Mississippi of which county the deceased at the time of his death had his place of residence. She gave bond and was duly qualified as administratrix and is now acting as such.

Plaintiff is advised and charges that by reason of the aforesaid willful, careless and negligent acts of the said defendant and consequent injuries to and death of the said interstate a right of action has accrued to her as the legal representative of his estate to recover such damages as shall be fair and just with reference to the injury resulting from such death to the plaintiff, the widow and children of the deceased, and such damages as the jury may assess taking into consideration all damages of every kind to the decedent and damages of every kind to the said widow and children, and such damages plaintiff charges amount to a large sum, to-wit, the sum of thirty thousand dollars; no part of said damages have — paid or released.

Wherefore plaintiff brings this action and demands judgment for said sum with interest and cost.

ALEXANDER & ALEXANDER,
Att'ys for Plaintiff.

Filed July 5th, 1906.
DAVID PACE, *Clerk.*

In the Circuit Court of Newton County, Mississippi, to July Term, 1906.

No. 951.

MARY ALICE HICKS et al.

vs.

THE MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY.

Declaration.

Plaintiffs, Mary Alice Hicks, suing for herself, and Nettie Mary Hicks, Austin Leon Hicks, Alice Rea Hicks, and Sarah Elizabeth —— minors, suing by Mary Alice Hicks, mother and next friend, complain of the Mobile, Jackson & Kansas City Railroad, and
6 for cause of action state the following:

The Mobile Jackson & Kansas City Railroad Company is a corporation chartered and organized under the laws of this state, and operating a line of railroad, a part of which lies in Newton County, Mississippi.

On October the 28th, 1905, the said Rea Hicks was in the employ of the defendant company as foreman of section crew and, together with his crew was at work on defendant's railroad between Decatur junction in said county and Stratton, the immediate place of their work or employment being near a bridge over a dry creek.

About twelve o'clock noon of said day, the said Rea Hicks with the members of his section gang, having just stopped for dinner were standing or sitting near the track, when a freight train of the defendant company running North approached at a very rapid rate of speed, to-wit: thirty or forty *hours* an hour and when it came near the place where the said Hicks was, three or four box cars in said train were derailed and one of them fell or was thrown upon Mr. Hicks, crushing him into the ground and horribly mutilating and mangling his body, and causing injuries from which he died.

The train was made up of seven box cars, one of which was empty, one caboose and one passenger coach, together with the locomotive and tender, and was in charge of an engineer name- Boyd. The railroad was newly built and but recently in operation. Indeed, the entire line had not been completed and the track for that reason was not smooth, secure and safe like that of a railroad which had been well ballasted and long in use. The said train was a freight train, operated by the crew of a freight train, but on that run had attached to it a passenger coach filled with passengers and the train was considerably behind time.

The causes of the derailment and consequent injury to and death of the said Hicks were as follows:

First, the negligence of the defendant company knowingly employing and putting in charge of said train an inexperienced, in-
comp-tent, unskillful and reckless engineer, as the result of
7 which the train was run at a dangerously rapid rate of speed, especially dangerous in view of the condition of the track, as above stated.

Second. The negligence of the defendant company in knowingly employing and putting in charge of the train an inexperienced, incomp-tent and reckless engineer, as a result of which the freight train running at a very rapid rate of speed was through the unskillfulness of the engineer suddenly attempted to be checked, thus causing the box car in the train under the sudden impact — jumping from the track.

Third. The negligence of the defendant Company in allowing the box car which first jumped from the track to be equipped with trucks of an improper guage so that the wheels did not properly fit the tracks and by reason of which the derailment occurred.

Fourth. The negligence of the defendant company in allowing the flange on the wheel of the box car which first jumped from the track to become worn, defective and unsafe, by reason of which the derailment occurred.

Fifth. The negligence of the defendant company in fixing a schedule for said train, which in view of the condition of its railroad was excessive and dangerous, and as a result of which the derailment occurred.

Sixth. The negligence of the defendant company in that the car that jumped first from the track was not equipped with good and sufficient brakes and brake shoes so that its motion and speed could be controlled, and because the said train and said car had not been properly equipped with air brakes so that the speed and motion of the train could be regulated.

The said Hicks being thus, as stated, horribly crushed and mangled, was taken to the hospital in Hattiesburg where after suffering intense and indescribable agony in body and mind, he lingered for several days and died. He was a young man about thirty years of age, physically strong, sound and healthy, sober and industrious, having that expectancy of life enjoyed by a
8 man of his age and physical condition, and he was earning more than one hundred dollars a month, and supported in comfort his wife and his four children, comprising his family, he died intestate, leaving as his heirs and distributees the plaintiffs herein, to-wit, Mary Alice Hicks, his widow, age 27 years; Nettie Mary Hicks, age 8 years, Austin Leon Hicks, age 6 years; Alice Rea Hicks, age four; Sara Elizabeth, —— age two; all of whom were solely dependant on him for a support. The expectancy of each of the plaintiffs is equal to if not greater than the expectancy of the deceased.

Plaintiffs are advised and charge that by reason of the aforesaid willful, careless and negligent acts of the defendant and consequent injuries to and death of the said husband and father, a right of action has accrued to them to recover such damages as the jury may assess, taking into consideration all damages of every kind to the decedent and all damages of every kind to any and all parties plaintiffs in this suit resulting from such injury and death. Such damages plaintiffs charge amount to a large sum, to-wit, the sum of $30,000.00.

No part of said damages have been paid or released, wherefore

plaintiffs bring this action and demand judgment for this sum with interest and costs.

ALEXANDER & ALEXANDER,
Att'ys for Plaintiffs.

Filed July 5th, 1906.
DAVID PACE, *Clerk.*

Attorneys then read their several pleas which are in words and figures as follows, to-wit:

In the Circuit Court of Newton County, January Term, 1907.

No. 950.

MARY ALICE HICKS, Administratrix,
vs.
MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY.

Plea.

9 And the defendant by its attorneys, comes and defends the wrong and injury, when, etc., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, in manner and form as the plaintiff has above thereof complained against it: And of this the defendant puts itself upon the country, etc.

MAY & FLOWERS,
Att'ys for Defendant.

Filed January 28th, 1907.
DAVIS PACE, *Clerk.*

No. 950.

MARY ALICE HICKS, Administratrix,
vs.
MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY.

Special Plea.

Comes the defendant in this cause by its attorneys and for a special plea in this behalf says:

The deceased, Ray Hicks, was guilty of negligence at the time the said injury occurred in that he *was* unnecessarily stood near the passing train, and if the engineer in charge of the said train was negligent in running the train over the said track at this said point at the rate of speed at which it was running and in attempting to check it suddenly then the said deceased saw such acts of the engineer, knew the condition of the track and knew whether such running was dangerous and in standing near the passing train he

was negligent and such negligence contributed to the injury which he suffered, and this the defendant is ready to verify.

FOY & BANKS,
MAY & FLOWERS,
Attorneys for Defendant.

Issue in short by consent.
ALEXANDER & ALEXANDER.

Filed Feb. 5, 1907.
DAVID PACE, *Clerk.*

In the Circuit Court of Newton County, January Term, 1907.

No. 951.

MARY ALICE HICKS et al.
vs.
MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY.

10 *Plea.*

And the defendant by its attorneys, comes and defends the wrong and injury, when, etc., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, in manner and form as the plaintiff has above thereof complained against it: And of this the defendant puts itself upon the country, etc.

MAY & FLOWERS,
Att'ys for Defendant.

Filed January 28th, 1907.
DAVID PACE, *Clerk.*

No. 951.

MARY ALICE HICKS et al.
vs.
MOBILE, JACKSON & KANSAS CITY RAILROAD CO.

Special Plea.

Comes the defendanr by its attorneys, and for a special plae in this behalf says:

The said deceased, Ray Hicks, was himself guilty of the negligence in that he unnecessarily stood near the track on which the train was passing and unnecessarily exposed himself to danger from accident and by his said negligence contributed to the injury which he suffered, and this the defendant is ready to verify.

FOY & BANKS,
MAY & FLOWERS,
Att'ys for Defendant.

Issue in short by consent.
ALEXANDER & ALEXANDER.
For Plaintiff.

Filed Feb. 5th, 1907.
DAVID PACE, *Clerk.*

The plaintiffs then offered their testimony, and at the conclusion of their testimony motion was made by the defendant to exclude the same and for a pre-emptory instruction to find for the defendant, and the court overruled said motion, and the defendant then offered testimony, all of which testimony and the motion to exclude and the exception to the action of the court in overruling the
11 said motion are set out in the stenographer's notes as certified to by the stenographer and approved by the trial judge, which stenographer's notes are in words and figures as follows:

No. 951.

MARY ALICE HICKS et al.
vs.
MOBILE, JACKSON & KANSAS CITY R. R. Co.

No. 950.

MARY ALICE HICKS, Administratrix,
vs.
MOBILE, JACKSON & KANSAS CITY R. R. Co.

Consolidated.

Dr. W. A. SPIVEY, being duly sworn, testifies, as follows:

Q. Do you remember the occasion of the derailment of the train between here and Stratton one year ago last Oct. in which Mr. Ray Hicks was fatally injured?
A. Yes sir I do.
Q. What is your Profession?
A. Physician and surgeon.
Q. Were you called on that occasion to attend Mr. Hicks?
—. Yes sir I was telephoned for a few minutes after the accident occurred, and I went as quick as I could.
Q. Were you acquainted with Mr. Hicks?
A. Yes sir.
Q. Did you find him when you arrived at the scene of the derailment?
A. Yes sir.
Q. Was he living when you got there?
A. Yes sir and conscious.
Q. In what condition was he?
—. He was conscious of everything. I found that he was fatally injured, as the membrane of the rectum was punctured.
Q. Would you say that was necessarily fatal?
A. Yes sir I would consider it so, and especially so when it
12 was deep as it was.
Q. Did he live or die?
A. He died but I didn't attend him until his death.
Q. What became of him after you attended him?
A. They carried him to the section house and I dressed his wounds

and then he was put on a special train and sent to Hattiesburg to a hospital.

Q. Where was he when you reached the scene of the derailment?

A. In a box car. They had gotten him up and taken him in this box car and laid him on some cushions they had taken from the passenger coach.

Q. Did you see him any more after he was carried to Hattiesburg?

A. No Sir.

Q. When did he die?

A. Just three days after his injury.

Q. Was that injury painful?

A. It was very painful: It could not have been otherwise. It was the most horrible puncture that I have ever seen in my life, and how he lived as long as he did I can't see.

Cross-examination (none).

Mrs. Mary Alice Hicks, being duly sworn, testifies as follows:

Q. What is your name?

A. Mary Alice Hicks.

Q. I see in one of these suits you are suing as administratrix; Are you the administratrix of Ray Hicks estate, appointed in this county and now acting?

A. Yes sir.

Q. I see in the other suit you have brought suit as the widowed wife of Ray Hicks: You are his wife are you?

A. Yes sir.

Q. I will ask you this: How old was your husband at the time of his death?

A. 28 years old.

Q. In what business was he engaged in?

A. Section foreman.

13 Q. On what railroad?

A. On the M. J. & K. C. R. R.

Q. On the Mobile, Jackson & Kansas City Railroad?

A. Yes sir.

Q. Where does that railroad run?

A. Between Mobile and some place in Tenn.

A. Does it run through this county?

A. Yes sir.

Q. Where was his work? in what county?

A. In this county.

Q. Newton County?

A. Yes sir.

Q. Was he a section foreman at the time he was killed?

A. Yes sir.

Q. Where were you living at the time he was killed?

A. At the section house at Decatur junction.

Q. What is your age?

A. 27 years old.

Counsel for the defendant makes objection to this question and

all similar questions which are asked for the purpose of getting before the jury the age and expectancy of this witness herself, and of her children, and the expectancy of the deceased because such testimony is incompetent for the jury to consider in passing upon the suit brought by the administratrix; The liability of the Company, if there is any liability, being limited in the first suit *to* what the deceased could have recovered had he *re*vived.

Objection overruled and defendant then and there excepted to the said ruling of the Court.

Counsel for the defendant desires it to be understood without renewing this objection from time to time; that the objection is made to all questions and answers having the above definite purpose in view.

Q. What is the name and age of your children, yourself and Mr. Ray Hicks at the time of his death?

14 A. Mary Jenette Hicks, age 8 years; Austin Leon Hicks, age 6; Alice Ray Hicks, age 4 years; Sarah Elizabeth Hicks, age 2 years and myself 27 years of age.

Q. What was the physical condition as to the healthfulness of your husband at the time of his death?

A. It was good.

Q. What was his earning capacity at the time of his death?

A. He received $50.00 per month from the company and about $75.00 per month from his men; That is he boarded his men, and made about that much out of them every month.

Q. What do you mean by that?

A. Well, he received $50.00 per month salary from the Railroad Company and *h*ade about $75.00 per month furnishing his men and loaning them money.

Q. What do you mean by boarding his men? What did that have to do with the Section Foreman's position?

A. Well, they generally boarded their men.

Q. What was his habits as to industry?

A. They were good.

Counsel for the defendant desires to be understood as objecting to these questions and answers relative to the earnings of the deceased at the time of his death, and of his earning capacity and his habits of life.

Said objection was overruled by the court, to which rulings of the Court, the defendant then and there excepted.

Q. What was his habits as to frugality and sobriety?

A. They were good.

Q. What did he do with his earnings?

A. He saved some of it.

Q. What did he do with the rest?

A. He took it to live on.

Q. How do you mean?

A. To support myself and children.

Cross-examination (none).

15 BLANT MCALPIN, being duly sworn, testifies, as follows:

Q. What is your name?
A. Blant McAlpin.
Q. Where do you live Mr. McAlpin?
A. I live here in Decatur.
Q. What is your occupation?
A. Just now I am not doing anything, but have been buying timber.
Q. Do you remember the occasion of the wreck in which Mr. Ray Hicks was killed in this county?
A. I do.
Q. Where did it take place?
A. About two miles North West of this place.
Q. Do you remember the date this occurred?
A. No sir I do not remember the date, but it was the time the Association was in Philadelphia.
Q. Where were you on the day he was killed?
A. On the train going to Philadelphia.
Q. The train on what railroad?
A. On the M. J. & K. C. R. R.
Q. The Mobile, Jackson & Kansas City Railroad?
A. Yes sir.
Q. State whether or not it was a passenger train or a mixed train?
A. It was a mixed train with one passenger coach.
Q. What else was it composed of?
A. There was a caboose just in front of the Passenger coach, and six or seven freight cars just ahead of the caboose.
Q. Were you on the passenger coach?
A. Yes sir, in the front end of it.
Q. Were you on that train at the time these cars derailed.
A. Yes sir.
Q. Did you see Ray Hicks after the derailment?
A. Yes sir.
Q. Where did you see him?
A. Really I didn't see him until after we got the car up so we could pull him out from under it.

16 Q. Where was he?
A. He was on the North side of a little creek by the name of Dry Creek on the East side of the track near the North East corner of the car.
Q. What car do you speak of, of having caught him?
A. A box car.
Q. Of the train you were on?
A. Yes sir the train I was on and the cars composing the train.
Q. Did you see him before the wreck occurred?
A. No sir I couldn't see him.
Q. You knew him didn't you?
A. Yes sir.
Q. What did you see or observe that day as the cause of the derailment?
A. Mr. Hicks requested me as soon as——

Objection; Objection sustained.

Q. Please state what you saw or observed that day as the cause of the derailment?

A. I saw it before it left the track. I couldn't see any cause for it in connection with the track.

Q. You saw no cause in connection with the track?

Objection; Objection Sustained.

Q. Did you see or observe anything about the train or its motion to cause the derailment?

A. They were running at an unusual high rate of speed.

Q. Are you accustomed to riding on the train?

A. Yes sir I have rode on quite a number.

Q. On freight trains? What was the speed of that freight train just before the derailment?

A. The best of my knowledge, I would say about thirty miles per hour. That is my best judgment about it.

Q. What was the speed of that train compared with the ordinary rate of speed of freight trains on that railroad?

A. Something like a little over or double the speed of an ordinary freight train on that particular part of the road.

17 Q. What, if anything directed your attention that day before the injury to the speed of the train?

A. Just before the wreck I remarked to——

Objection.

Q. What happened, if anything to fix on your memory the speed of the train at that time?

A. I do not know hardly. I knew it was running faster than I ever rode on it before and I had rode on it a good many times.

Q. State whether or not your attention was called to the rate of speed before the injury?

A. Yes sir.

Q. How?

A. By the speed it was making I suppose.

Q. Please state whether or not the speed was such as to attract the attention of the passengers generally?

Objection; Objection overruled and defendant then and there excepted to the rulings of the court.

Q. Go ahead and answer my question?

A. What was your question.

Q. Please state whether or not the speed of the train was such as to attract the attention of passengers generally?

A. Yes sir it was.

Q. How do you know that it was?

A. I made the remark at the time to——

Objection.

Q. You did make a remark about the speed of the train?

A. Yes sir.

Q. Did you hear any other remarks made about the speed of the train?

A. Yes sir.

Q. State whether or not the speed of the train was a subject of comment by the passengers before the injury?

Objection: Question withdrawn by Counsel for Plaintiff.

18 Q. How did the speed of the train effect the coach you were in?

A. It didn't seem to rock it much, but I noticed that it was running faster than I had ever seen it run before when I was on it. I made mention of it to several parties on the train about it.

Cross-examination:

Q. You have no interest in this case have you?

A. No sir none whatever.

Q. You are absolutely un-biased are you?

A. Yes sir.

Q. You have no feelings one way or the other have you?

A. No sir

Q. You don't care which way it is decided?

A. No sir.

Q. You did, however, assist counsel for the plaintiff in getting a jury did you not?

A. Yes sir at the request of Mr. Hicks before we got him from out under the car.

Q. He requested you to do that did he?

A. No sir he requested me to get the names of every one present and turn them over to his wife.

Q. Then you have some interest haven't you?

A. Yes sir I have that much interest.

Q. When you say that train was running at the rate of 30 miles per hour, that is just an estimate of yours is it not?

A. Yes sir.

Q. You couldn't swear it was running 30 miles per hour could you?

A. I could swear that I believed it.

Q. You never did run a train did you?

A. No sir but I have rode on quite a number.

Q. You do know, however, it was running faster than you had been accustomed to seeing freight trains run on the M. J. & K. C. R. R.

A. Yes sir.

Q. I believe you said after it stopped, you did look to see if there was anything about the track to cause this wreck?

A. Yes sir.

19 Q. Did you see anything?

A. No sir I didn't. Mr. Hicks also requested me to get some men to see where it left the track, and measure the distance from where it left the track to where it run over him.

Q. Where did you get on this train at?

A. Here at Decatur.

Redirect examination:

Q. Was this an old railroad or a new railroad?
A. It was a new railroad.
Q. How long had it been in operation at the time of this injury When did it begin operating regularly?
A. That was about the first running of trains with coaches attached to box cars.
Q. Give the jury the result of your measurement of the distance between the point where the train left the track and the point where it turned over on Mr. Hicks?
A. I didn't make the measurement myself but I saw it done.
Q. Well how much was it?
A. Eight and one half rails from where it left the track to where it turned over on Mr. Hicks.
Q. What was the general condition of this Railroad as to smoothness of its track; whether ballasted or not.
A. It seemed to be all right.
Q. Was it gravel ballasted?
A. No sir only sand along there.

Recross-examination:

Q. You say you were present when the distance was measured from the point where the car left the track and where it turned over on Mr. Hicks?
A. Yes sir.
Q. How long were the rails that you speak of?
A. They claim 33 feet to the rail?
Q. Were you in the Passenger coach when this wreck occurred?
A. Yes sir at the North East corner of the coach at the window.
Q. Was that the rear car of the train?
A. Yes sir the very back car of the train.
Q. Did the car you were in get off of the track?
A. No sir.
Q. How far from the locomotive was the car that did get off of the track?
A. My recollection about it is that there was three cars attached to the locomotive that did not get off of the track, the third car on the East side did not clear the track; it stuck in the side of the embankment and made a great hole there, and it caused the coach that we were in to give us a great jolt, and knocked us back a few feet.
Q. How many cars got off the track?
A. I think there was five cars that got off the track; two on the West side of the track and three on the East side.
Q. What car was it that fell on Mr. Hicks?
A. It must have been about the last car?
Q. The last car got off the track?
A. Yes sir that is my judgment about it.
Q. Then you measured the distance between the points where Mr

Hicks was and the point where you first saw signs of the flanges on the cross ties did you?

A. Yes sir.

Q. You don't think that the first car that got off the track fell on Mr. Hicks do you?

A. No sir.

Q. But you think that it was the last one, or the one nearest to the coach you were in; That is of the cars that got off of the track?

A. Yes sir that is my idea about it.

Q. You think there were five cars that got off of the track?

A. Yes sir two on the West side and three on the East side.

Q. From your knowledge of the points and the cars that got off of the track; it is your judgment that the car that got off and fell on Mr. Hicks was five car lengths behind the first car that
21 got off of the track; is that correct?

A. I couldn't say for certain about that.

Q. What side of the track was Mr. Hicks on.

A. On the East side.

Q. And the first car that got off of the track, got off on the opposite side?

A. I couldn't say about that.

Q. Didn't you see those signs?

A. Which signs.

Q. Those signs which were made by the wheels on the cross ties?

A. No sir we measured south from where the car fell over on Mr. Hicks to where it got off of the railing on the cross ties.

Q. Was this train going North or South?

A. North.

Q. And Mr. Hicks was on the East side of the track?

A. Yes sir.

Q. You went up there while the car was on him did you?

A. Yes sir.

Q. And you had the distance measured from that point to where you first saw signs of the wheels on the cross ties did you?

A. Yes sir.

Q. At the time that car got off of the track that made those signs, the car that fell on Mr. Hicks was five car lengths back south of the car that got off first wasn't it? And the car that come on and fell on Mr. Hicks?

A. Mr. Hicks was under the North East corner of that box car.

Q. You say it was eight and one half rails from the point where Mr. Hicks was to the point where you first saw signs of the cars leaving the track? The car that fell on Mr. Hicks was four or five cars behind the first car that got off wasn't it?

A. I don't know about that.

Q. You said that you measured from where the first car left the track didn't you?

A. I don't know what car got off first.

Q. You said the last car was the car that got on Mr. Hicks didn't you?
22 A. Yes sir it was, and from where we first saw the first sign of wheels on the cross ties to where the car fell over on Mr. Hicks was eight and one half rails.

Q. Did the locomotive get off of the track?
A. No sir.
Q. There was three or four cars next to the locomotive that did not get off of the track wasn't there?
A. Yes sir there was three that didn't get off.
Q. There was three cars attached to the locomotive that didn't get off of the track were there?
A. Yes sir.
Q. The first one that got off of the track was uncoupled from the one immediately in front of it wasn't it?
A. I do not remember about that.
Q. How far was Mr. Hicks from the track when you saw him?
A. I suppose eighteen or twenty feet.
Q. Was he down the embankment?
A. Yes sir.
Q. Did the car roll down the embankment?
A. I think the car that caught him changed ends.
Q. Where did you say he was?
A. He was not quite at the bottom of the embankment, but he was near the bottom of it.
Q. Was there any people on the train?
A. Yes sir it was about as full as could be packed on there. Mighty few more could have been crammed in there.
Q. Can you tell how much space there was between the rails and the edge of the embankment or where the slope of the embankment begins; how much level space there is out from the rails before the embankment begins to slope?
A. Only a little. I suppose the rail was within a foot of the embankment.

That's all.

J. A. KEITH, Jr., being duly sworn, testifies, as follows:

Q. What is your name?
23 A. J. A. Keith.
Q. Where do you live Mr. Keith?
A. Here in Denver.
Q. Where were you living last October one year ago when Mr. R. Hicks was killed?
A. About two miles west of this place.
Q. Do you remember the occasion when Mr. Hicks was killed?
A. Yes sir.
Q. Where were you at the time of the derailment of the train?
A. About four or five hundred yards this side of where he was killed.
Q. On the track?
A. No sir, I was about fifty yards up the track.
Q. Did you see the train coming?
A. Yes sir.
Q. Did you see Mr. Hicks and his crew of men before the derailment of the train.
A. Yes sir.

Q. Where was he?

A. Right down on the other side of the trestle, and I was up this side about four or five hundred yards.

Q. How far was he from the track when this derailment occurred.

A. He just stepped off the track down the dump about four or five feet. He might not have been off the dump. He was just off of the track.

Q. You saw him there before the wreck did you?

A. Yes sir.

Q. State w-at he was doing there if you know?

A. He was at work. I had been around him several times when he was at work.

Q. That day?

A. No sir at other times.

Q. He was working in what capacity? In what position was he working.

A. His hands were at work.

Q. What was his business?

24 A. He was Section Boss on the railroad.

Q. What railroad?

A. M. J. & K. C. R. R.

Q. The Mobile Jackson & Kansas City railroad?

A. Yes sir.

Q. State whether or not any of his hands were about him on that occasion.

A. Yes sir, all of them were at work when the train come.

Q. And he stepped down the dump when it came.

A. Yes sir.

Cross-examination:

Q. What were you doing up there that day?

A. There was a negro woman over there doing my washing, and I had come after some clothes, and was going back, and was in about fifty yards of the railroad, and I made this remark——

You need not tell w*ah*t remark you made——

Q. So you went over there to get your clothes from your washwoman?

A. Yes sir.

Q. And you were standing there looking down the track?

A. No sir I was looking at the train when it come by.

Q. Were you north or south of the train?

A. I was east of the train.

Q. And you were four or five hundred yards away?

A. I was about fifty yards from the railroad.

Q. And four or five hundred yards from Mr. Hicks.

A. Yes sir, south of him.

Q. The train had passed you t*eh*n, had it?

A. Yes sir.

Q. You say Mr. Hicks was working at that time?

A. Yes sir.

Q. And his hands were working also were they.
A. Yes sir.
Q. And he was standing among them superintending was he?
A. Yes sir.
Q. And the train came along and he stepped off to one side on the dump for the train to pass?
A. Yes sir.
25 Q. You are certain of that are you?
A. Yes sir.
Q. You were about one fourth of a mile away?
A. Yes sir, I was four or five hundred yards south of him.
Q. In an open field?
A. Yes sir.
Q. There was no obstruction of any kind between you and Mr. Hicks?
A. Yes sir, there was a little timber between me and him, but I could see him all right.
Q. Were you in any house then?
A. No sir.
Q. Had you already gotten your clothes?
A. Yes sir.
Q. You were going home then were you?
A. Yes sir.
Q. You had left the house where you had got your clothes had you?
A. Yes sir.
Q. Had you your clothes with you?
A. Yes sir.
Q. And there was no obstruction between you and Mr. Hicks I believe you said?
A. Ye- sir, there was a little timber, but mighty little, and I could see him all right.
Q. You say you had been where his hands were at work that day?
A. No sir not that day, but I had been around them before that.
Q. Was his gang of men all white men?
A. All negroes I think, I don't think he had any white men in his gang that day.
Q. You could tell from where you were, looking through the timber a quarter of a mile away that Mr. Hicks and his hands were working on the track, and that as the train approached Mr. Hicks got down on the side of the dump to let the train pass could you?
A. Yes sir.
Q. They had not knocked off for dinner had they?
A. No sir but it was time for dinner.
Q. If the plaintiffs in this case say that they had knocked off f- dinner they are mistaken are they not?
A. Yes sir, they must be because they were at work when
26 I saw them. I got on a hand car his dinner was on and went on up there after the wreck.
Q. What time of day was that?

A. About twelve o'clock.
Q. You are sure of that are you?
A. Yes sir.
Q. Was Mr. Hicks hurt north or south of the trestle?
A. North of the trestle.
Q. Do you know whether he was at work north or south of the trest-e that day?
A. I don't know about that. He might have been working along there that day, but I won't be sure about it.
Q. Where do you live now?
A. Here. I am boarding here now?
Q. Who did you first tell about this wreck, did Mr. McAlpin get your name that day?
A. I was over here one day and was talking about it, and Mr. Newt Doolittle was the first man that asked me anything about it. I told him if anything I knew would do him any good, I would come here and tell him what I saw.

Redirect examination:

Q. Did you observe the speed at which that freight train was running that day?
A. No sir.
Q. Did you take any notice of it at all?
A. Yes sir.
Q. State how fast it was running to the best of your knowledge?
A. I think it was running pretty fast.
Q. How fast was it running according to your best judgment?
A. The best I know I think it was running twenty or twenty-five miles per hour.
Q. How fast were they running compared to the speed they had been running?
A. Faster.
Q. What if anything impressed that on your memory? How come you to remember about how fast it was running?
A. Because they had the wreck, I reckon is what made me remember it.
Q. What, if anything, called your attention to the speed
27 A. I can't tell you why.

Recross examination:

Q. You say according to your judgment this train was running from twenty to twenty-five miles per hour when it passed you?
A. Yes sir.
Q. Do you think it was running any faster when it was derailed than when it passed you?
A. No sir.
Q. Did you observe any checking of the train just before it was derailed?
A. If it did I didn't notice it.
Q. You were looking at it were you not?
A. Yes sir.

S. W. MONROE being duly sworn testified as follows:

Q. What is your name?
A. S. W. Monroe.
Q. What is your name, residence, age and occupation Mr. Monroe?
A. S. W. Monroe, 49 years old.
Q. And your residence and occupation?
A. Just now I live south of Hickory. Farmer.
Q. Mr. Monroe do — remember the occasion when Mr. Ray Hicks was killed north of Decatur year before last?
A. Yes sir I do.
Q. Where were you on that day?
A. On that train going to Philadelphia.
Q. What kind of train was it?
A. Freight train and passenger mixed.
28 Q. Were you a passenger on that train?
A. Yes sir.
Q. Were there any other passengers on that train?
A. Yes sir, quite a number of others.
Q. How come it to happen that there was a passenger coach on a freight train?
A. I do not know.
Q. Where were you all going on that occasion?
A. To Philadelphia to an Association. I don't know how come it to be a mixed train.
Q. Were you on the train at the same time part of it was derailed and Mr. Hicks was caught under it?
A. Yes sir.
Q. Where were you?
A. In the passenger coach two cars from the one that got off the track, but I won't say from the one that was on Mr. Hicks.
Q. What were you doing before the wreck?
A. Nothing only sitting on my seat in the coach.
Q. What, if any observation or notice did you take of the speed of the train?
A. I noticed that it was running about thirty miles per hour.
Q. Are you accustomed to riding on trains?
A. Yes sir, some.
Q. How did the rate of speed of that train compare with the usual and customary speed of freight trains, do you know anything about the rate of speed of freight trains on this road?
A. No sir.
Q. Do you know anything about the speed of this train compared with the usual and customary speed of freight trains on the Mobile Jackson & Kansas City R. R.?
A. No sir.
Q. What is your best judgment of the speed?
A. I would say according to my best judgment, this train was running about thirty miles per hour.
Q. What, if anything at that time called your attention to the speed of that train?

29 A. I couldn't tell you how it was, but there were some one — the train that remarked——

Q. State if there was anything said or done that called your attention especially to the speed of that train before the wreck?

A. No sir.

Q. What caused you to remember that it was running too fast?

A. What caused me to think it was running too fast was because it was a new road.

Q. How long had that railroad been built at that time?

A. Only a very short time.

Q. What was the condition of the track?

A. The track seemed to be very good, but it was newly built, and I didn't think it ought to run as fast when it was newly buil- as when it is settled.

Q. State what was said or done on the train, if anything, that called your attention to the speed of the train?

A. Not anything especially.

Q. Did you go out when the train stopped?

A. Yes sir.

Q. What did you find that caused the derailment, if anything?

A. I noticed that the ties were knocked up after the train run off.

Q. What did you find, if anything, that caused the derailment of the cars?

A. Nothing at all.

Q. Then you didn't find anything to cause the derailment of the train?

A. No sir nothing at all.

Cross-examination none.

Rev. W. B. Sansing, being duly sworn, testified as follows:

Q. Give the Stenographer your age, residence, name and occupation?

A. W. B. Sansing, 33 years old. Live at Newton. Editor.

Q. You are a minister also are you not?

A. Yes sir.

Q. Do you remember the occasion when Mr. Ray Hicks was hurt in a wreck north of Decatur?

A. Yes sir.

30 Q. Where were you at that time?

A. I was in the car.

Q. Were you a passenger on the train?

A. Yes sir.

Q. What kind of train was it?

A. It was a mixed train, all freight cars except one on the rear end and a Caboose in front.

Q. Was there anyone else on the train?

A. Yes sir it was very badly crowded.

Q. Was there any special occasion anywhere that caused it to be crowded that day.

(Objection.)

Q. Did you see Mr. Hicks after the train stopped?
A. Yes sir, after he was taken out from under the box car.
Q. Have you had any experience in riding on freight trains and passenger trains mixed as this one was?
A. Yes sir, I have had a great deal of experience in riding on regular passenger trains, but not very much on freight trains and mixed trains.
Q. Have you had experience enough to judge the speed of a train?
A. Yes sir.
Q. What is your best judgment as to the speed of that train just before the derailment?
A. I would think not less than twenty-five miles per hour.
Q. What would you say as to the speed, the comparative speed of that train compared with freight trains on that road?
A. It was rather fast for a freight train.
Q. Was the train on time or behind time that day?
A. My recollection it was behind time.
Q. What, if anything, called your attention to the speed of the train before the derailment occurred?
A. I confess a little uneasiness.
31 Q. Uneasiness about what?
A. The rate of speed they were going.
Q. Uneasiness about what?
A. About my safety.

Cross-examination:

Q. Did you or not notice the checking of the train a short while before the derailment?
A. No sir, I did not.
Q. Didn't notice anything of that kind?
A. No sir.
Q. What do you know about the condition of the track up and down this railroad. I mean the condition of any particular mile of track. You never had any occasion to know that have you?
A. Nothing more than I have traveled over it?
Q. You know anything about the track at this particular place compared with the track up and down the line, north and south?
A. Nothing more than at that time it seemed to be an average track.
Q. Did you find anything wrong or defective about the track, that caused this derailment?
A. I didn't observe anything that was out of place that was not caused by the derailed train.

J. R. WOODHAM, being duly sworn, testified as follows:

Q. Where do you live?
A. Two miles southwest of Newton, Miss.
Q. What is your business or occupation?
A. Farming and nursery.
Q. Do you remember the time when Mr. Ray Hicks was injured fatally in a wreck?

A. Yes sir.
Q. Where were you that day?
A. On the train that wrecked.
32 Q. Were you a passenger on that train?
A. Yes sir.
Q. What were you doing just before the wreck?
A. I was standing up talking to Mr. Blant McAlpin.
Q. Where were you standing?
A. In the North end of the car.
Q. Why were you standing up?
A. Because the train was crowded there was hardly sitting room in the coach.
Q. Have you been accustomed to riding on trains?
A. Yes sir, right smart.
Q. State whether or not your experience riding on trains enabled you to form some estimate as to the speed this train was running?
A. I suppose it was running about forty miles per hour.
Q. What directed your attention to the speed of the train, so as to make you remember it?
A. After we left Decatur junction we could feel the jerk of the train increasing the speed all the time. I just noticed the increase of the speed all along after we left the junction. It was a very level and straight track where the wreck occur-ed. an- the train was at a very high rate of speed when it run off of the track. I stated just now that the track was very level; I didn't mean to say that, as the track was down grade for some distance along there.
Q. What do you say as to the speed of that train compared with the ordinary speed of freight trains on that railroad?
A. It was much faster.
Q. What comparison would you make of it?
A. I think it was making at the time of the wreck at least forty miles per hour.

Cross-examination.

Q. You have had several suits against the railroad company yourself haven't you?
A. Yes sir two or three.
33 Q. Have you been in court with suits against the railroad ever since the road has been built through this county have you not?
A. Yes sir part of the time.
Q. All the time haven't you?
A. Yes sir nearly.
Q. You had a suit against the company last court did you not?
A. Yes sir.
Q. And now this court you are as a witness against the railroad?
A. Yes sir.
Q. You think this train was running forty miles per hour do you?
A. Yes sir.
Q. Although you haven't stated that you have had such experience

as to make a correct estimate of speed, yet you say it was running 40 miles per hour?

A. I have rode on trains that suppose to run one mile per minute.

Q. You don't know whether this train was running over 25 miles per hour or not do you.

A. I think so.

Q. You couldn't swear that could you?

A. No sir that is only my guess.

Q. Where were you going that day?

A. Going up here to Philadelphia.

Q. Did Mr. McAlpin get your name that day as a witness in this case?

A. I do not know whether he did or not.

Q. Who did you give your name to?

A. I didn't give it to anybody.

Q. How did they find out that you knew so much about it?

A. Mr. Turnipseed called on me and asked me about it. He come to see me last summer about it.

Q. How did he know that you knew anything about it?

A. He told me that Mr. McAlpin gave him my name.

Q. I believe that you said that you were standing up because you could not get a seat?

A. Yes sir.

34 Q. You had to stand up did you?

A. There was no vacant seat at the time as I remember.

Q. You had to stand up on that account then?

A. Yes sir.

Dr. CAROWAY, being duly sworn, testified, as follows:

Q. Where do you live doctor?

A. At Philadelphia, Mississippi.

Q. What is your proffes-ion?

A. Practicing physican.

Q. Were you on the train that Mr. M. Ray Hicks was fatally injured b- the wreck?

A. Yes sir.

Q. Were you a passenger on that train?

A. Yes sir.

Q. You remember the occasion of course; Can you remember where you were just before the wreck?

A. Yes sir, I was on the caboose.

Q. Were you in the caboose or passenger?

A. I was in the caboose setting between the doors.

Q. Any one else in there with you?

A. Yes sir there was a number of people in there, but most of them were railroad men.

Q. After the derailment and the train stopped, did you see Mr. Hicks?

A. Yes sir after some little bit.

Q. What, if any observation did you make of the track to find the cause of the derailment? Did you make any?

A. I went up where it was and looked around there, but I couldn't find any cause for the wreck. I went down and looked at the place where it left the track, but I couldn't see any cause for the train leaving the track.

Q. What kind of a track was it? Was it a new track or an old track?

A. New track and was necessarily rough.

35 Q. What would you say as to the speed of the train just before the derailment of the train?

A. I don't know hardly, but I suppose somewhere between 35 and f40 miles per hour; that is my best judgment about it.

Q. What experience have you had in riding trains on the Mobile, Jackson & Kansas City Railroad?

A. I have rode a right smart on it and I have noticed the schedule on other roads.

Q. Are you familiar with the speed of trains?

A. Yes sir I have rode on other railroads and know the speed they are supposed to go according to schedule.

Q. How did the speed on this occasion compare with the usual speed of a freight train on this railroad?

A. I don't know about the freight train. We had to ride on a mixe- train that day. It run about as fast as any of them.

Q. Run as fast as any passenger train or freight train?

A. Yes sir as fast as either?

Q. Did it run as fast as passenger trains usually run?

A. Yes sir very near it.

Q. What, if anything happened, or was said or done that called you- attention to the speed of the train.

A. I could see that the people were getting a little excited. I could see that some of them were excited, or at least they seemed so. I was a little excited myself.

Cross-examination.

Q. Had you ridden on passenger trains before?

A. Yes sir.

Q. Had you ridden on mixed trains befire that day?

A. Yes sir.

Q. Do people all get excited when they are on mixed trains?

A. I never had seen them scared that way before on a train.

Q. You had not been uneasy that way before had you?

A. No sir.

Q. But you were mighty uneasy that day?

A. Yes sir.

36 Q. Have you a suit up in Neshoba against the railroad Company?

A. Yes sir I have had two, but I have got rid of one.

Q. So you have got one there now?

A. Yes sir.

Q. So you are using them up there and appearing down here as a witness.

A. Yes sir I am trying to keep even.

Q. Making it pretty warm for them, and are trying to keep even wit- them are you Doctor?
A. Yes sir.
Q. Doctor did you ever have one of your guesses as to the speed of a train tested?
A. No sir.
Q. Do you consider yourself an expert on the speed of trains?
A. No sir.
Q. Do you consider yourself capable at any time to tell the speed of a train?
A. No sir.
Q. You made a memorandum of the speed of that train did you not doctor?
A. No sir.
Q. You made up your mind to that effect right then and there didn't you doctor? When did you make up your mind as to how fast that train was running?
A. I made it up several times.
Q. Do you remember of making up your mind that this train was running 35 or 40 miles per hour on that occasion?
A. Yes sir, I made up my mind that day that train was running as fast as any train I ever rode on.
Q. Since you have had so much experience riding trains, I wish yo- would state to that jury whether you felt the motion of the train more in the caboose than in the passenger coach?
A. It shakes you up a little more.
Q. You would naturally think it was running faster in a caboose than if you were in a coach would you not? You would feel
37 the motion of the train more in a caboose than in a coach would you not?
A. Yes sir.
Q. This caboose attached to this train didn't get off of the track did it?
A. No sir.

Redirect examination.

Q. Was the train on time or behind time that day?
A. I do not remember about that. We had gotten on at Newton.
Q. Did you go on to Philadelphia that day?
A. Yes sir after they sent another train there.

Recross-examination.

Q. Did you give your name that day to Mr. McAlpin?
A. Yes sir.

Redirect examination.

Q. Did you come voluntarily today, or was you summoned?
A. I was summoned.

Recross-examination.

Q. You were summoned at home were you not?
A. Yes sir.

Q. They sent up there after you did they?
A. Yes sir.

G. M. McMULLEN, being duly sworn, testifies, as follows:

Q. Your name is G. M. McMullen?
A. Yes sir.
Q. Were you a passenger on the train that wrecked, in which Mr. Ray Hicks was injured?
A. Yes sir.
Q. Where were you before the wreck?
A. Setting on the rear end of the coach just inside.
Q. Were you in the caboose or the coach?
A. I was in the coach.
38 Q. Where did you get on the train? At what point?
A. At Newton.
Q. You had been on it from Newton until the time of the injury had you?
A. Yes sir.
Q. As to your best judgment, how fast was that train running just before the wreck?
A. It was doing its best running just at the time of the wreck.
Q. You mean it was doing the best running it had done since it had left Newton?
A. Yes sir.
Q. Have you had any experience in riding on trains?
A. Some, but that was the first freight train I ever rode on.
Q. What would be your judgment as to the rate of speed of that train at the time of the wreck?
A. I don't know.
Q. So then you don't know how to measure the speed of a train?
A. No sir I do not.
Q. Was it running fast or slow?
A. Fast.
Q. How did the speed compare with the ordinary speed of freight trains? How did the speed at the time of this wreck compare with the ordinary speed of freight trains?

Objection.

Q. Give some idea as to the comparative speed at that time with th- speed at other points?

Objection: Question withdrawn by counsel for plaintiff.

Q. What, if anything called your attention to the speed that train was running just before the wreck?
A. I don't know.
Q. What caused you to notice the speed of the train?
A. It seemed like it got faster.
Q. Then the increase of speed directed your attention?
A. Yes sir.
Q. At the time of the wreck how did the speed compare with the

speed it had been maintaining before that between Newton
39 and Decatur, and Decatur and the point where the wreck occur-ed?

A. It was some faster than at other points.

Cross-examination.

Q. You have traveled a good deal on trains have you not?

A. Not very much.

Q. Where do you live?

A. Eight miles South of Decatur.

Q. You have traveled on both the A. & V. R. R. and the M. J. & K. C. R. R. have you not?

A. Yes sir some.

Q. You haven't traveled enough on the railroad to make an expert o- the speed of trains have you?

A. No sir only from judgment.

Q. You don't pretend to be able to say how many miles per hour that train was running, or any other train to you?

A. No sir. All I know about it. is that the train was running pretty fast.

Q. You just know this train was running pretty fast, but you don't know how many miles per hour it was running do you?

A. That is correct.

Q. Have you any interest in this case?

A. No sir none whatever.

Q. Were any of the members of your family on this train that wrecked?

A. Yes sir I had a sister and brother on there.

Q. None of the members of your family has a claim against the railroad have they?

A. No sir.

GEO. B. LAIRD being duly sworn, testifies, as follows:

Q. Where do you live Mr. Laird?

A. 6 miles East of here.

Q. What is your occupation?

A. Farming.

40 Q. Were you on the train on the Mobile, Jackson & Kansas City Railroad in October 1905 when Mr. Ray Hicks was fatally injured?

A. Yes sir.

Q. How did you happen to be on that train?

A. I had started to Philadelphia to an association.

Q. Where were you just before the wreck occur-ed?

A. I was in the caboose.

Q. Were there anyone else in there with you?

A. Yes sir there was quite a number of people in there.

Q. Have you had any experience in riding on trains?

A. I have rode a right smart first and last.

Q. What is your best judgment as to the speed that train was running just before the wreck?

A. I expect 25 or 30 miles per hour maybe more. I know it was running pretty fast.

Q. What, if anything, called your attention to the speed of that train?

A. I was sitting in the caboose and was looking out, and it looked like to me it was running faster than it had been in the habit of; It seemed like that to me, and I had been on it before, and that is the way it seemed to me.

Q. What caused you to notice the speed before that wreck, if anything?

A. You mean before the thing had occur-ed?

Q. Yes sir.

A. The jar and jerking.

Q. You felt the jar and jerking?

A. Yes sir I did that.

Q. How long had that railroad been built at that time? About how long?

A. I think the first train that ever come up the road was in July before the wreck in October.

Q. What was the general condition of the railroad bed as to being ballasted or not?

A. I couldn't tell you about that.

41 Q. You are not an expert on that?

A. No sir.

Q. How did the speed just before the wreck compare with the usual and ordinary speed of trains on that road? Freight trains?

A. That was the first freight train I was even on, on that railroad.

Q. Did you go on to Philadelphia?

A. No sir they told me there would not be any more trains that day and I did not go any further.

Cross-examination:

Q. You don't pretend to be an expert on the speed of trains do you?

A. No sir.

Q. If you say you think this train was running about 25 or 30 mile- per hour, that is just a guess is it not?

A. I think it was.

Q. How do you measure it?

A. What.

Q. The speed that train was running?

A. I was looking out the window and it looked like to me it was running at least that fast.

Q. Can you tell us how fast it was running?

A. Yes sir according to what they say it was running pretty fast.

Q. Would you be willing to swear that train was running 25 or 30 miles per hour?

A. Yes sir.

Q. Then you would be willing to swear that it was running 25 or 30 miles per hour without having any speed knowledge as to how this train was running?

A. Yes sir I have rode on trains enough to know that it was running pretty fast, I sure know that.
Q. Where do you live?
A. About six miles North East of here.
Q. Did Mr. McAlpin get your name the day this wreck occur-ed?
A. No sir.
42 Q. Did Dr. Caroway get it?
A. No sir, if he did, it was un-beknowence to me.

CHARLIE MCMULLEN, being duly sworn, testifies, as follows:

Q. Where do you live?
A. Two and one half miles East of Decatur.
Q. What is your occupation?
A. Farming.
Q. Were you on the train that fatally injured Mr. Ray Hicks?
A. Yes sir.
Q. Where were you?
A. In the passenger coach on the rear end of the train.
Q. What is your best judgment about the speed of that train? How fast was it running?
A. I don't know real-y. About 25 or 30 miles per hour I reckon.
Q. Did you see Mr. Ray Hicks after he was caught under the train?
A. Yes sir I did.
Q. Did you make any observation to see what caused the derailment o- the train?
A. No sir I did not.
Q. Have you had any experience in riding on trains?
A. Not a great deal.
Q. You have had some have you not?
A. Yes sir.
Q. What, if anything called your attention to the speed of that train?
A. I had rode on trains before on that railroad, and it didn't go quite so fast.
Q. What do you mean by so fast? How would you compare it?
A. Well, You could take a slow horse and start out and go mighty slow, and then you could get a fast horse and go mighty fast.
Q. You don't have to be an expert to tell when a horse is going fast or when the train is going fast do you?
A. No sir.
Q. What directed your notice to the speed of that train? Did any thing happen to make you notice it?
43 A. No sir not anything, but I did notice that it was running a little faster than I thought it ought to run on a Railroad like that.
Q. What do you mean when you say "a Railroad like that"?
A. A new Railroad you know is a little rougher than an old road.

Cross-examination (none).

WILLIAM J. MCMULLEN, being duly sworn, testifies, as follows:

Q. Where do you live Mr. McMullen?
A. Five miles South of here.
Q. What is your occupation Mr. McMullen?
A. Farming.
Q. Were you on the train that killed Mr. Hicks?
A. Yes sir.
Q. Where were you on the train?
A. On the passenger coach?
Q. What is your best judgment about the speed of that train? How fast was it running just before the derailment?
A. I thought it was running tremendous fast considering the train and road.
Q. What do you mean by that?
A. It was a new road, and I suppose it was running somewhere from 20 to 30 miles per hour.
Q. What, if anything, directed your attention, or caused you to notice the speed of the train?
A. Nothing more than it seemed like to me it was going too fast. I am not accustomed to riding on the railroad like a good many men, but I thought it was going a little too fast.
Q. Well, about how was it running compared with the usual speed of freight trains on that road?
A. I don't know that I ever rode on a freight train before.
Q. How did the speed at that point compare with the speed at other points that the train had covered?
44 A. I got on here and I hadn't rode very far before this happened.

Cross-examination:

Q. How far was it from here to where the accident occurred?
A. I don't know hardly as I never was at that place before.
Q. How long had the train been running since it left here up to the time the accident occur-ed?
A. Only a little while; about two or three miles out of town.
Q. Do you think it is two or three miles from the junction down here to where the accident occur-ed?
A. I suppose it is something like two miles.
Q. At this junction down here the train started didn't it? That wa- the last stop it had made wasn't it? It had to come up to the station up here at Decatur and then back down on the main line, and take a start North; then it was not but about two miles from there to where this accident occur-ed? Is that correct?
A. Yes sir something like that.
Q. You have traveled on trains a great deal I believe you said?
A. No sir I have not.
Q. When the train starts, it gets a little faster all the time don't it?
A. Yes sir.

J. I. BRADLEY, being duly sworn, testifies as follows:

Q. On the train that was wrecked and caused the death of Mr. Ray Hicks; was you on that train?

A. Yes sir.

Q. Where did you get on the train? At what point?

A. Here at Decatur.

Q. Where were you just before the wreck occur-ed? In what part of the train?

A. I was setting in the front part of the box. I was setting in the front part of the passenger coach on the second seat back.

Q. What is your best judgment as to the speed that freight train was running at the time of the wreck, or just immediately before the wreck?

45 A. I would say 30 or 35 miles per hour; It was running at a very fast speed.

Q. What caused you to notice the speed of the train?

A. There was some of us in the car that had made mention to each other, that the train was running too fast, is why we noticed it.

Cross-examination:

Q. How far is it from the Decatur junction down here to where the accident occur-ed?

A. I don't know.

Q. Two or three miles isn't it?

A. I suppose so.

Q. You don't think it was over two miles do you?

A. Around the railroad it is, but through this way it is not over two miles.

Q. So then you think around the railroad it is over two miles; do you mean from here down to the junction and up to where this wreck occur-ed, or do you mean from the junction down here to where the accident occur-ed?

A. I mean from here to where the accident occur-ed. Well, I couldn't say about it.

Q. You can make as good guess on this as you could on the speed of the train can't you?

A. Well, I would say it was between two and three miles up there.

Q. Have you ever had any of your guesses as to the speed of trains tested?

A. No sir.

Redirect examination:

Q. Is your guess work based on experience or your best judgment? What do you mean by a guess?

A. Some of us were talking about the train running so fast, and someone said——

46 Q. What do you mean by guessing?

A. Because I did not know how fast it was going and I just made a guess at it. It is only guess work with me.

Q. Have you been accustomed to noticing the speed of horses and buggies?
A. Not much.
Q. Do you know how long it takes to drive from here to your home and things of that sort?
A. I never noticed particular about anything like that.

Recross-examination:

Q. Did you ever ride a horse that went 35 or 40 miles per hour?
A. No sir I never was on a horse that went that fast, and never want to be.

G. W. MABRY, being duly sworn, testifies, as follows:

Q. Where do live Mr. Mabry?
A. Six miles South West of here.
Q. What is your occupation?
A. Farming.
Q. Were you on the train that injured Ray Hicks and caused his death?
A. Yes sir.
Q. How did you happen to be on that train?
A. I was going to an association.
Q. Were you a passenger on that train?
A. Yes sir.
Q. Where were you just before the wreck occur-ed?
A. On the train.
Q. Well, what part of the train?
A. In the passenger coach.
Q. I want to get your best judgment as to the rate of speed that train was moving at the time of the wreck?
A. I think it was something like about 30 or 35 miles per hour.
47 Q. That is just a guess about the speed? You don't know do you? Have you ever had one of your guesses te-ted?
A. I don't know that I have, but I don't think that I have missed it very fur.
Q. That is just a guess is it not? You don't know it do you?
A. No sir I don't know it, but it was running faster than I wanted to ride on it.
Q. Especially after the wreck?
A. Yes sir and before to-.
Q. In your guess I believe you said it was running from 30 to 35 miles per hour, didn't you?
A. Yes sir.
Q. You don't know whether your guess as to the speed of that train is correct or not do —?
A. No sir.
Q. That is just a guess you have made where you had to give your guess under oath?
A. Yes sir.

Q. This is your first time to have to testify as to the speed of a train is it not?
A. Yes sir.

W. L. ROBINSON, being duly sworn, testifies, as follows:

Q. Where do you live Mr. Robinson?
A. Five miles from here.
Q. What is your occupation, and where do you live? In what direction?
A. I live five miles South West of here and am a farmer.
Q. Did you know Mr. Ray Hicks who was killed in a wreck a mile or so above here on the Mobile, Jackson & Kansas City Railroad?
A. No sir.
Q. You saw him the day he was killed didn't you?
A. Yes sir.
Q. How came you to see him?
48 A. I hoped to get him from under the car that fell over on him.
Q. How did you come to be there?
A. I had started to the association at Philadelphia.
Q. Then you were a passenger on that train?
A. Yes sir.
Q. Where were you just prior to the wreck?
A. In the passenger coach.
Q. What is your best judgment as to the rate of speed of that train at the time of the wreck?
A. My best judgment it was running 35 or 40 miles per hour.
Q. What, if anything, caused you to notice the speed of the train, or direct your attention to it?
A. I thought it was running mighty fast for a freight.

Cross-examination:

Q. You never have had one of your guesses as to the speed of a train tested have you?
A. If I have had, one of your sort done it.
Q. How do you mean that my sort have tested one of your guesses?
A. Well, you asked it.
Q. You don't know anything about the speed of a train do you?
A. Yes sir.
Q. You have never had one of your guesses tested, in order to know that you are correct have you?
A. No sir.

Mr. H. C. MCWILLIAMS, being duly sworn, testified as follows:

Q. Where do you live and what is your occupation?
A. I live in Newton County. Farmer.
Q. Did you know Ray Hicks, the man that was killed on the railroad up here last October one year ago?
A. No sir.
Q. Did you see him the day he was injured in the wreck?

—. Yes sir.

49 Q. How did you come to see him?

A. I was on the train at the time the train wrecked and turned ove- on him?

Q. What part of the train was you on?

A. On the back end of the coach.

Q. On the passenger coach?

A. Yes sir.

Q. What is your judgment as to the speed of the train at the time of the wreck?

A. I couldn't say.

Q. Have you no idea about it?

A. I never timed a train in my life.

Q. Well, what is your best judgment about it?

A. It seemed to me like it was running about as fast as any train I ever rode on.

Q. Have you been accustomed to riding on trains?

A. Yes sir some.

Q. Had you ever rode on a mixed train before; That is a passenger and freight train combined?

A. No sir I never rode on a mixed train before in my life.

Q. Have you no idea as to the number of miles per hour this train was making?

A. No sir.

Cross-examination (None).

J. L. HARRISON, being duly sworn, testifies as follows:

Q. Were you on the train that wrecked and fell on Mr. Ray Hicks?

A. Yes sir.

Q. Were you a passenger on the train?

A. Yes sir.

Q. Where were you? In what part of the train?

A. I was riding in the front end of the passenger coach.

Q. Did you take any notice to the speed of the train or pay any attention to it?

A. Yes sir some.

50 Q. What is your best judgment as to the rate of speed the train wa- going?

A. My best judgment about it is, that the train was going about 30 or 35 miles per hour.

Q. What, if anything, called your attention to the speed of the train, or caused you to notice it?

A. I never rode on that road before and I didn't know much about it, but it appeared to me that the train was running to- fast. It seemed to me like I could fe/l the train getting faster all the time, and I knew it was going down grade before we were wrecked and still I could feel the train increasing speed, and that is what called my attention to the fact that it was running to- fast.

Cross-examination:

Q. What is your occupation?
A. Farming.
Q. Do you live in this county?
A. Yes sir.

Plaintiff rests.

Counsel for the defendant here moves the court to exclude the testimony offered by the plaintiff in this case and for a peremptory instruction to the jury to find for the defendant, basing their motion upon the following grounds, to-wit:

1st. The plaintiff has undertaken to make proof of no allegation in the declaration filed by the widow and children, but has only attempted to prove the allegation in the declaration filed by the Administratrix, and the proof offered to support the allegation in the said declaration does not show that the deceased, Ray Hicks, was an employee of the defendant company, belonging to one of the classes enumerated in Sec. 193 of the constitution and for whose benefit the said section was ordained; The said Ray Hicks not having been engaged in a dangerous employment at the time he was hurt within the meaning of said Sec. 193.

51 2nd. The said Section 193 of the Constitution of 1890 of the State of Mississippi and Sec. 3559 of the Code of 1892 under which this suit was brought are violative of the fourteenth amendment of the Constitution of the United States, in that they deny railroads corporations the equal protection of the laws.

3rd. The plaintiff has made no proof of any negligence, or wilfulness or recklessness on the part of the engineer in charge of the running of the train, the said case being based solely on this allegation in the declaration filed by the Administratrix.

4th. The plaintiff has offered no proof as to the condition of the track at the place and along that part of it over which witnesses have said that the train was running from 20 to 40 miles per hour; the proof only having been directed to the speed of the train, and it has not been attempted to be shown that this rate of speed over this particular track was imprudent or negligent to any extent.

5th. The plaintiffs have offered evidence to show that the train was running at a rapid rate of speed at the time the cars were derailed, but they have offered no evidence tending to show what would be a reasonable rate of speed at this place, or why the running of the train at any rate of speed between 20 and 40 miles per hour would be negligent on the part of the engineer in charge of the train; the evidence offered by the plaintiffs in itself shows that the deceased was standing near the track in plain view; That he was a section boss of experience and accustomed to the running of trains along this track, and that he stood by the track and saw the train coming and voluntarily remained near the track and if there was any danger which could have been anticipated by the engineer in charge of the train, it could just have plainly and easily under the plaintiff's testimony have been anticipated and seen by the deceased himself.

7. If there was any carelessness or recklessnes- in the running of the train on this particular track at the rate of speed at which it was running when it was derailed, then the testimony further shows that this carelessness, negligence, or recklessness was seen by the
52 deceased himself, and if there was any danger therefrom, he voluntarily exposed himself to it, and by his own acts contributed to the injury he received and he cannot therefore recover.

8. The testimony offered by the plaintiff, if it shows negligence on the part of the engineer in charge of the running train, also just as strongly and plainly shows negligence on the part of the deceased.

This enumeration of causes on which this motion is based, is not intended to be excluded, but others will be assigned if they occur to the counsel.

The Court overruled the above motion, to which counsel for the Defendant then and there excepted to said ruling.

The following testimony was taken for and in behalf of the defendant, to-wit:

JAMES ONEAL, being duly sworn, testifies as follows:

Q. What is your name?
A. James Oneal.
Q. Do you hold any position with the Mobile, Jackson & Kansas City Railroad Company?
A. Yes sir.
Q. What is that position?
A. Foreman of the car department.
Q. Where do you live Mr. Oneal?
A. In Mobile, Ala.
Q. Is that your headquarters?
A. Yes sir.
Q. Is that where you work?
A. Yes sir.
Q. Did you hold that position in October 1905?
A. Yes sir.
Q. Do you recall anything now about the wreck that happened up about two miles North of Decatur Junction on the Mobile, Jackson & Kansas City Railroad in October 1905?
A. Yes sir.
53 Q. If you had anything to do in connection with that wreck, please state what it was?
A. I was called there to pick up the wreck after it occur-ed. There were four cars derailed and turned over, and one car that was damaged but not turned over. I was called there with the wrecking crew to pick up the cars.
Q. Tell the jury whether you examined the track along there South of where the cars were turned over?
A. Yes sir I looked over the track, as that was my duty to look over it and see what was the cause of the wreck?
Q. State what you found?

A. The track was in good condition, except where it was damaged by the cars being derailed.

Q. Did the rails spread there where the wreck occur-ed?

A. Yes sir right at the particular part where the cars got off of the track, but everything showed that the track was in good condition before the derailment of the cars.

Q. How could you tell where the cars first got off of the track?

A. The marks of the flanges showed on the cross ties, or at least the indenture made by the flanges on the wheels.

Q. What did you say was the condition of the track at that particular point?

A. It was in good condition.

Q. Did you examine the track South of where the accident occur-ed?

A. Yes sir.

Q. What was the condition of the track South of the accident for two or three hundred yards?

A. The track was in good condition.

Q. What was the cause of that wreck?

A. I do not know.

Q. What was your purpose in going there besides picking up the wreck?

A. To examine the equipment of the cars and locate what was the cause of the action.

Q. And you failed to find what was the cause of the wreck did you?

54 A. Yes sir.

Q. How long have you been a railroad man?

A. Sixteen years.

Q. How old are you now?

A. Thirty six years old?

Q. Have you been a Railroad man since you were twenty years old?

A. Yes sir.

Q. Have you been familiar with cars and tracks all that time?

A. I have been familiar with cars all that time and am pretty familiar with the tracks. I know a good piece of track when I see it.

Q. Are you able from the knowledge you have of such things to tell the rate of speed on a track of that kind at this particular place, would be reasonable safe?

Objection.

Q. Did you know the equipment of this train; the make up of it?

A. Yes sir.

Q. Will you please state what would be a reasonable safe speed for a train made up as this one was on a track of this kind?

A. About thirty five miles per hour would be a safe speed for the train over that kind of track.

Q. That is not true as to all the track of the M. J. K. C. R. R.? at that time is it?

A. No sir.

Q. Is it true that part of the track at that time was as good as any Railroad old or new, and that part of it, was so bad until the train could not hardly pass over it?

A. Yes sir some of it is as good as any ordinary track and some of it is in very bad condition.

Q. How did this particular part of the Railroad where this accident occur-ed, compare with other parts of the railroad?

A. It was about as good as any track they had at that time.

Cross-examination:

Q. Where is your headquarters?

A. At Mobile, Ala.

Q. In the shops there?

55 A. Yes sir.

Q. Where were you when this wreck occur-ed?

A. In Mobile.

Q. How soon did you hear of it?

A. I couldn't say exactly.

Q. Do you remember when you left Mobile to come up to where this accident occur-ed?

A. No sir not the exact time.

Q. Well, state about when?

A. Probably the next day about the same time. I do not know exactly when it was.

Q. So then you did not go there to relieve the people that were in the wreck, or to clear away the wreck? You didn't take a wrecker there with you did you?

A. Yes sir we did.

Q. Is that what you went for?

A. Yes sir.

Q. Was that the nearest wrecker train you had? At Mobile?

A. Yes sir.

Q. You stated something about the rate of speed of this train; how was this train equipped?

A. It was what we call a mixed train, composed of freight cars and a coach, and one caboose.

Q. How do you know that train was composed of a coach, caboose and box cars?

A. I saw the cars there, and knew that was what the train was made up of.

Q. How do you know the train was made up that way? It had been taken up when you got there hadn't it?

A. Yes sir.

Q. Do you know what engine was pulling the train?

A. No sir.

Q. Then you don't know anything about the engine, that was pulling the train?

A. No sir.

56 Q. What do you mean by saying that you know the proper speed that train could go, when you don't know anything

about the equipment of the train. Do you know what engine was pulling that train, the number of the engine?

A. No sir.

Q. Well, then what do you mean by testifying that you know the proper speed that train could go when you don't know the equipment, nor what engine was pulling the train?

A. I said the train was made up of an engine, coach, caboose and some box cars.

Q. Then you are assuming that it ought to safely go thirty five miles per hour on a good track, with a good engine and train properly handled, is that correct?

A. The train was in good fix.

Q. You don't know whether that train was good for 35 miles per hour or not do you? That particular train?

A. I will say that I think it was.

Q. You don't know anything about the engine that was pulling that train do you?

A. No sir but I knew all about five of the cars composing the train.

Q. Some engines on the Mobile, Jackson & Kansas City Railroad are better than others on the road; isn't that true?

A. Yes sir some are older and some are newer.

Q. The best engines are generally used on the passenger run are they not?

A. I don't know about that. There are one class of engines used on passenger runs, and another class on freight runs.

Q. The usual rate of speed of freight trains is a great deal slower than on passenger trains is it not?

A. Yes sir.

Q. What was the schedule time of freight trains on the Mobile, Jackson & Kansas City Railroad at that time?

A. I do not know exactly, but I think about 18 miles per hour.

Q. Isn't it 15 to 18 miles per hour the schedule time on that road?

57 A. Yes sir I believe so.

Q. Isn't it a fact that the schedule is fixed at what is regarded by the Railroad as the largest, or greatest speed the train can safely go at?

A. Yes sir.

Q. Isn't it necessary for the Railroad to get as many passengers and freight moved in 24 hours as possible.

A. Yes sir.

Q. Can you tell why the schedule of freight trains is fixed at 15 miles per hour instead of 40 miles per hour?

A. I do not know hardly unless it is for the safety of the train. I don't know anything about that part of the business. I am not interested in that part of the business.

Q. You came as rapidly as you could from Mobile to where this accident occur-ed did you not?

A. Yes sir I came pretty fast.

Q. How fast did the train come that you came up on from Mobile?

A. I couldn't tell you.

Q. What is the schedule of the passenger trains on the Mobile, Jackson & Kansas City Railroad?

A. I do not know.

Q. Isn't it about 20 miles per hour?

A. I suppose something in the neighborhood, but I don't know for certain what it is.

Q. If that train had been composed of reasonable good box cars, engine, coach and caboose, would it have been dangerous for it to move along that particular track at the rate of 40 miles per hour? In your judgment?

A. Right at that particular place I don't think that it would.

Q. Well, say at any point on the road, would it be proper and safe for freight trains to go forty miles per hour over it; I am speaking about the best parts of the road?

A. Yes sir I think so.

Q. Couldn't it go 50 miles per hour with safety?

A. It might.

Q. Couldn't it go 60 miles per hour with safety? Can't you make it a little better?

58 A. I wouldn't want to say that.

Q. If this freight train could go 45 miles per hour with safety, why don't the Railroad Company make a change and have the freight trains to carry passenger- and the passenger train to haul freight

A. I don't know.

Q. I want you to answer this question for me. If your passenger trains make 20 miles per hour and your freight trains make from 35 to 45 miles per hour, why don't the Company change it and make passenger trains out of freight trains, and freight trains out of passenger trains?

A. I don't know.

Q. Are you a machinist?

A. No sir.

Q. You are only in the wrecking Department?

A. Yes sir in the repairing of cars and such like.

That's all.

Defendant rests.

End.

I, C. H. Newman, official Court Stenographer of the 8th Judicial District of Mississippi, hereby certify that the above and foregoing 48 pages is a true and correct copy of the testimony taken in the above styled suit as shown by my stenographic notes.

C. H. NEWMAN,
Stenographer.

These suggestions for correction by counsel for defendant (appellant) is allowed and the notes as corrected approved, this April the 26th, 1907.

GEO. H. ETHRIDGE,
Special Judge.

Filed March the 30th, 1907.
DAVID PACE, *Clerk.*

59 At the conclusion of the testimony the plaintiff asked the following instructions which were granted by the Court over the objections of the defendant.

1. Although plaintiff- count upon several distinct acts or -missions, which are alleged to be negligence and grounds for recovery, it is not essential to a recovery by plaintiffs that the evidence establish every act or -mission alleged in the declaration. Nor is it necessary before plaintiffs can recover that their case may be made out beyond every reasonable doubt but only by a preponderance of the evidence to the satisfaction of the jury.

Given.

Filed Feb. 6th. 1907.
DAVID PACE, *Clerk*.

2. Before the jury can find that Ray Hicks was guilty of contributory negligence they must believe from the evidence that he unnecessarily or care-sly expose- himself to a danger from derailment that could have been reasonably anticipated by a prudent man in his situation or by himself circumstanced as he was. But he was not bound to anticipate a derailment caused by negligence, if such there was, in the rapid running of the train, unless the danger was such as was seen or might have been seen by him by exercising reasonable caution, in time to avoid it, and that he then failed to make reasonable effort to protect against it.

Given.

Filed Feb. 6th, 1907.
DAVID PACE, *Clerk*.

3. If the jury find for plaintiff then it is a proper element of damages to accord compensation for whatever bodily and mental pain if any they find from the evidence Ray Hicks suffered consequent upon the injury, such damages are not punitive but compensatory.

Given.

Filed Feb. 6th, 1907.
DAVID PACE, *Clerk*.

60 4. The jury is instructed for plaintiff that under the laws of this State proof of injury inflicted by running of the train makes a prima*l* facie case of negligence on the part of the railroad Company and it having been shown in this case that Hicks was fatally injured by the running of a train the burden is on the defendant to meet this prima*l* facie case and show the facts that exculpate it, and if the evidence does not show absence of negligence on the part of defendant or unless it shows the existence of contributory negligence on the part of Hicks the jury must find for the plaintiff.

Given.

Filed Feb. 6th, 1907.
DAVID PACE, *Clerk*.

The defendant then asked instructions Nos. 1, 2, and 3, all of which was refused by the court, to which action of the Court the defendant then and there excepted:

1. The Court instructs the jury to find for the defendant.
Refused.

Filed Feb. 6th, 1907.
DAVID PACE, *Clerk*.

2. The Court instructs the jury for the defendant that in arriving at your verdict you are not to consider any testimony as to the number of children left by the deceased, nor any testimony as to the ages of the widow and the children, all such testimony being incompetent and irrelevent under the other evidence offered.
Refused.

Filed Feb. 6th, 1907.
DAVID PACE, *Clerk*.

3. The Court instructs the jury for the defendant that if you should find for the plaintiff you must award no damages to the widow for the loss of her husband and no damages to the children for the loss of their father. If you should award any damages at all you should give no greater sum in this case than you would if there were no widow nor children.
Refused.

Filed Feb. 6th, 1907.
DAVID PACE, *Clerk*.

61 The defendant then asked instruction No. 4, which was modified by the Court as herein shown:

(*Original No.* 4.)

The Court further instructs the jury for the defendant that the burden is upon the plaintiffs in this case to satisfy your minds by a prepondreance of the evidence that the injury complained of was caused by the running of the said train at a high rate of speed and further that said act was negligence.

(*Amended No.* 4.)

The Court further instruct- the jury for the defendant that the burden is upon the plaintiff in this case to satisfy your minds by a preponderance of the evidence that the injury complained of was caused by the running of the said train and when said facts are proven to the satisfaction of the jury it devolves upon the defendant to show facts exculpating it for negligence, and the jury are the judges of the sufficiency of the evidence to show exoneration.
Given.

Filed Feb. 6th, 1907.
DAVID PACE, *Clerk*.

Instructions Nos. 5, 6, 7, 8, 9, and 10 asked by the defendant were given by the Court as follows:

5. The Court instructs the jury for the defendant that if you believe from the evidence that the deceased by the exercise of reasonable care and caution could have prevented the injury which he suffered, then you will find for the defendant although you may further believe that the said engineer was negligent in running his train as he did.

Given.

Filed Feb. 6th, 1907.
DAVID PACE, *Clerk*.

6. The Court instructs the jury for the defendant that if you believe from all the evidence in this case that the occurrance which resulted in the death of the said Hicks was purely an accident; that it was due to causes unforeseen, and that it could not with the exercise of reasonable care and diligence, have been anticipated, then you will find for the defendant.

Given.

Filed Feb. 6th, 1907.
DAVID PACE, *Clerk*.

62 7. The Court further instructs the jury that if from all the evidence in the case you believe that the deceased was unnecessarily standing near the track and that he was negligent in standing there while the train was passing at the rate of speed at which it was running, and that the negligence on the part of the deceased contributed to any extent in bringing about the injury which he suffered and which resulted in his death, then you will find for the defendant.

Given.

Filed Feb. 6th, 1907.
DAVID PACE, *Clerk*.

8. The Court further instructs the jury for the defendant that while the witnesses were permitted to give their best judgment as to the rate of speed the said train was running immediately before the accident, yet it is for the jury to say whether such opinions are reliable; and in deciding as to whether you will accept the opinions of the witnesses who gave their opinions you should consider their qualifications to give opinions, their experience in such matters and also whether they are biased; and in every case the opportunities, advantages and experience of such witnesses should be considered, and such opinion evidence should be considered with care.

Given.

Filed Feb. 6th, 1907.
DAVID PACE, *Clerk*.

9. The Court instructs the jury for the defendant that although you should believe from the evidence that the engineer in charge of said train was running at a high rate of speed and that such act caused the injury complained of, yet, unless you further believe that the engineer was negligent in running the train as he did then you should find for the defendant.

Given.

Filed Feb. 6th. 1907.
DAVID PACE, *Clerk.*

10. The Court further instructs the jury for the defendant that in deciding whether the engineer was running his train at a
63 dangerous rate of speed you should take into consideration not only the speed but also the character of the track at the particular place over which it was being run at the time, and any other facts that may have been proved by the evidence.

Given.

Filed Feb. 6th, 1907.
DAVID PACE, *Clerk.*

Argument of counsel having been heard on both sides and the jury having retired presently returned into open Court the following verdict:

"We the jury find for the plaintiff for the sum of $7,500.00. Seven Thousand Five Hundred Dollars."

The Court having inquired of the jury what they intended to say by their verdict, by agreement of counsel it was corrected so as to express the finding of the jury: "We the jury find for the plaintiff for the sum of $7,500.00., Seven Thousand Five Hundred Dollars."

Thereupon the following judgment was at once rendered for the plaintiff- in words and figures as follows:

MARY ALICE HICKS, Adm'r'x,
vs.
MOBILE, JACKSON & KANSAS CITY RAILROAD CO.

and

MARY ALICE HICKS et al.
vs.
MOBILE, JACKSON & KANSAS CITY RAILROAD CO.

Came to be heard the above entitled causes, and the plaintiffs and defendant having appeared, thereupon came a jury of good and lawful men to-wit: D. W. Parks and eleven others who being duly sworn and empaneled to try the issue joined after hearing the evidence and argument of counsel retired to consider of their verdict and presently returned into open Court the following verdict: "We

the jury find for plaintiff- in the sum of $7,500.00." Thereupon it was agreed by counsel on both sides that the verdict might be put in
form, and the meaning of the jury ascertained by the Court,
64 and this being by consent done and the jury having declared that the sum assessed was to cover all damages to the parties lawfuly entitled to it, the verdict was reframed accordingly and it was therefore considered and ordered that the plaintiff- do have and recover of defendant, The Mobile, Jackson & Kansas City Railroad Company, for the benefit of Mary Alice Hicks, widow, and Nettie Mary Hicks, Austin Leon Hicks, Alice Ray Ricks and Sarah Elizabeth Hicks, Minors, the sum of Seven Thousand Five Hundred Dollars ($7,500.00) with interest from this date at 6% per annum and all costs to be taxed.

Then the defendant by its attorneys made its motion for a new trial in words and figures as follows:

In the Circuit Court of Newton County, January Term, 1907.

No. 950.

MARY ALICE HICKS, Adm'x,
vs.
MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY.

No. 951.

MARY ALICE HICKS et al.
vs.
MOBILE, JACKSON & KANSAS CITY RAILROAD CO.

Motion for New Trial.

Comes the defendant in the above styled causes by its attorneys and moves the court to set aside the verdict and judgment rendered in this cause and to grant it a new trial of the said causes for the following reasons, to-wit:

1st. The Court erred in overruling the demurrers to the declarations.

2nd. Because the Court erred in consolidating the two suits and compel-ing the defendant to try the two causes as one.

3rd. Because the court erred in not requiring the Administratrix to try her suit alone and the widow and children to try their suit alone.

4th. Because the Court erred in admitting testimony for the plaintiff- over the objection of the defendant.

5th. Because the court erred in admitting testimony in the
65 trial of the two cases which was competent in only one case, over the objection of the defendant.

6th. The court erred in overruling defendant'- motion to exclude the evidence offered by the plaintiff- and for a peremptory instruction, made at the close of the plaintiffs' testimony.

7. The court erred in granting the several instructions for the plaintiffs

8th. The court erred in refusing instructions asked by defendant and numbered 1, 2 and 3.

9th. The court erred in modifying instruction No. 4 asked — the defendant.

10th. The verdict is contrary to the law and the evidence.

11th. The verdict of the jury does not show in which action it was intended to be rendered, nor upon what cause of action, among the several charged in the two declarations, the said verdict was based.

12th. It appears from the said verdict that the jury awarded damages to all parties plaintiff in both suits without regard to the character of the act by negligence on the part of the defendant Company or its servants found by the jury to have been established by the evidence.

13th. Because the verdict of the jury does not show whether it found negligence on the part of a fellow servant of the deceased in another department of labor or negligence of the defendant Co. itself.

14th. The verdict shows, considered with reference to the testimony, that the jury may have awarded damages to the widow and children for an inquiry found by the jury to have been *called* by a fellow servant in another department of labor.

FOY & BANKS,
MAY & FLOWERS,
Attorneys for the Defendant.

Filed Feb. 7th, 1907.
DAVID PACE, *Clerk.*

66 The Court having considered said motion overruled the same by the following order:

No. 950.

MARY ALICE HICKS, Adm'x,
vs.
MOBILE, JACKSON & KANSAS CITY RAIL ROAD CO.

No. 951.

MARY ALICE HICKS et al.
vs.
MOBILE, JACKSON & KANSAS CITY RAIL ROAD CO.

Came on to be heard this day the motion of the defendant in the above causes to set aside the verdict and judgment and for a new trial, and the court having considered the same doth order that the said motion be and it is hereby overruled.

It is further ordered by the court upon the application of the defendant by its attorneys in open court that an appeal be allowed of

the said causes to the Supreme Court of the State from the judgement rendered against it here, and that the defendant — (90) ninety days from this date within which to prepare a bill of exceptions.

Filed Feb. 7, 1907.

DAVIS PACE, *Clerk*.

To which action of the court in overruling the motion for a new trial the defendant then and there excepted and prayed for an appeal to the Supreme Court of the State from the said judgement, which appeal was allowed, and the defendant then tendered its bill of exceptions and prayed that the same might be signed and approved by the presiding *jury*, which is accordingly done this 6th. day of May, 1907.

GEO. H. ETHRIDGE,
Special Judge.

Received and filed May the 8th. 1907.

DAVIS PACE, *Clerk*.

67 STATE OF MISSISSIPPI:

Know all men by these presents, that we, The Mobile, Jackson & Kansa- City Railroad Co. Principal and American Bonding Co. sureties, are held and firmly bound unto Mary Alice Hicks, administratrix, Mary Alice Hicks, and Mary Alice Hicks, next friend for Net-ie Mary Hicks, Austin Leon Hicks, Alice Ray Hicks and Sarah Elizabeth Hicks, in the penal sum of fifteen thousand dollars (15,000) well and truly to be paid for the faithful payment of which we bind ourselves, our successors and assigns firml- by these presents.

Witness our signatures this the 23rd day of March, 1907.

The condition of the above obligation is such that whereas on the 6th day of February, 1907, a judgment was rendered in favor of the above named obligees against the above bound principal obligor herein in the sum of seventy-five hundred ($7500.00) dollars in the Circuit Court of Newton County in two causes, Mary Alice Hicks, Administratrix, vs. Mobile, Jackson & Kansas City Railroad Company, No. 950 on the docket of said Circuit Court, and Mary Alice Hicks, for herself and as next friend for the *above* children above*d* named herein, No. 951 on the docket of said Court, which two cases were consolidated and tried together as one cause; and whereas the said principal obligor herein has prayed for and obtained an appeal to the Supreme Court of the State of Mississippi from the said judgment:

Now *thereof*, if the said Mobile, Jackson & Kansas City Railroad Company shall pay whatever judgment may be rendered against it in the Supreme Court in the said cause on appeal, to-

gether with interest, cost and damages, then this obligation shall be void; otherwise it is to remain in full force and effect.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY,
By J. N. FLOWERS, *Attorney.*
AMERICAN BONDING COMPANY OF BALTIMORE,
By J. W. THOMPSON, *Vice-President.*

Attest:
J. C. HOOD,
Ass't Secretary.

I hereby approve the foregoing bond. This the 30th day of March 1907.

DAVID PACE, *Clerk.*

68 STATE OF MISSISSIPPI:

To the Sheriff of Hinds County, in said State:

You are hereby commanded to summon Mrs. Mary Alice Hicks, Administratrix Appellee, or her attorneys in fact or of record, if to be found in your County, to appear before the Supreme Court of the State of Mississippi, at the capitol, in the city of Jackson in the County of Hinds, and State aforesaid, on the 14th day of October A. D. 1907 then and there to answer the appeal of Mobile, Jackson & Kansas City Railroad Company from the judgment of the Circuit Court of the Co-nty of Newton in said State rendered against said appellant on the 5th day of February, 1907 at the January Term A. D. 1907 of said Circuit Court, in favor of said appellee, for seven thousand five hundred dollars ($7500.00) & costs and have there then this writ given under my hand and the seal of said Circuit Court, at my office in Decatur, Miss., and issued this the 7th day of June A. D. 1907.

DAVIS PACE, *Clerk.*

Sheriff's Return.

I hereby acknowledge service of summons, and enter appearance in the above as above cited.

MARY ALICE HICKS,
Administratrix,
By ALEXANDER & ALEXANDER,
Attorneys.

69 STATE OF MISSISSIPPI,
Newton County:

I, Davis Pace, Clerk of the Circuit Court in and for said County and State do hereby certify that the foregoing pages contain a true and correct transcript in the cases of Mary Alice Hicks, Administratrix, vs. Mobile, Jackson & Kansas City Railroad Company No. 950 and Mary Alice Hicks et al. vs. Mobile, Jackson & Kansas City

Railroad Company No. 951 tried at the January Term 1907, of said Circuit Court and appeal- to the Supreme Court of said State, as shown by original papers now on file in my office at Decatur, Miss.

Given under my hand and seal of office this 7th day of June 1907.

DAVIS PACE.
Circuit Clerk.

I do hereby enter appearance for the appellees, plaintiffs in the Court below and consent that cases be heard at October Term 1907.

ALEXANDER & ALEXANDER &
GEO. B. POWER,
Att'ys for Appellees.

70 ***Revivor.***

October 22nd, 1907.

No. 12839.

MOBILE, JACKSON & KANSAS CITY RAILROAD CO.
vs.
MARY A. HICKS, Adm'x.

The death of M. A. Hicks, Administratrix of Ray Hicks, deceased being suggested, and shown, and it being shown that J. A. Turnipseed has been appointed and qualified as Administrator of Ray Hicks deceased in lieu of Mrs. M. A. Hicks and having appeared by Counsel and asked to be substituted, as such, it is ordered that he be substituted in lieu of the former administratrix as a party.

And it appearing that said J. A. Turnipseed has been by the proper Court appointed and qualified as administrator of Mrs. M. A. Hicks, and the record of such appointment has been duly filed in Newton County in the Chancery Clerk'- office and he having appeared and asked to be substituted for said M. A. Hicks, it is so ordered and *the having* ordered to proceed.

No. 12839.

MOBILE, JACKSON & KANSAS CITY RAILROAD CO.
vs.
J. A. TURNIPSEED, Adm'r of M. A. Hicks.

Argued orally by Mr. J. N. Flowers for appellant and Mr. C. H. Alexander and Chalmers Alexander for appellee, and submitted on briefs by May — Flowers & Whitfield and Alexander & Alexander & Powers and Chalmers Alexander for appellees.

71 March Term, 1908, Monday, April 20th, 1908.

No. 12839.

M., J. & K. C. R. R. Co.
vs.
Mary A. Hicks, Adm'x.

This cause having been submitted at a former term of this Court on the record herein from the Circuit Court of Newton County and the Court having sufficiently examined and considered the same and being of opinion that there is no error therein, it is ordered and adjudged that the judgment of said Circuit Court rendered in this cause at the January term A. D. 1907 on February the 6th, 1907 be and the same is hereby Affirmed: And that the appellee do have and recover of appellant and the American Bonding Company of Baltimore surety on the supersedeas bond, the sum of Seven Thousand and Five Hundred Dollars the amount of the judgment in the court below, together with the further sum of Three Hundred and Seventy Five dollars being damages at the rate of five per centum as allowed by law, as well as interest on the amount of said judgment at the rate of 6% per annum from date of rendition till paid and all the cost of this cause in this court and in the court below to be taxed &c.

72 12839.

M. J. & K. C. R. R. Co.
vs.
Mary A. Hicks, Adm'x, et al.

Whitfield, *C. J.*:

On October 28th, 1905, Ray Hicks, a section foreman on appellant's railroad, was working with his crew at a point about two or three miles north of the Decatur junction in Newton County. The crew had stopped for dinner, but were still on the track and near it, when a mixed passenger and freight train approached. Immediately behind the locomotive were several freight cars, and a passenger coach was on the back end of the train. The train was going north. Hicks ans his crew were walking in the same direction, Hicks being further north than the rest of the crew, and on the east side of the track. He had stepped off a few feet as the train approached. About the fourth car from the locomotive, when it was at a point about two hundred and eighty feet from Hicks, left the track, and about four other cars were then derailed, two of them falling on the west side of the track, and three on the east side, on which Mr. Hicks was. The last derailed car seems to have remained on the cross-ties until it reached a point nearly opposite where Hicks was standing, and it then turned over, falling on Hicks and inflicting injuries from which he died in about three days. There were a passenger coach and a caboose in the train, the passenger coach being at the rear end, and the caboose immediately in

front of the coach. These two cars were filled with passengers on their way to a Baptist Association at Philadelphia in Neshoba County. The coach and the caboose did not leave the track, and the passengers were unhurt.

It is shown by the testimony that the schedule fixed by this railroad, for its freight trains, was fifteen miles an hour, that it was a new road and not ballasted, and hence, necessarily rough; that this was the first train ever run over this road carrying passengers; and that the speed at which this first train was actually run was thirty to forty miles an hour; that the passengers were very much alarmed at the excessive rate of speed, and were in great concern about it just before the derailment occurred.

We think the testimony shows, with sufficient clearness, that this injury was due to the incompetency of the engineer, which
73 would make the master itself liable, and the excessive rate of speed of this first passenger train over this new, unballasted, and rough road. There can be no reasonable controversy as to the injury being due to these two causes. The incompetency of the engineer is manifested by the very nature of the occurrence. *Res ipsa loquitur* fits in perfectly as showing his gross incompetency.

Hicks was a young man about twenty-eight years of age, in good health, industrious, and of good habits. He left a widow twenty-seven years old, and four children from two to eight years of age. The jury returned a verdict for the plaintiff for $7,500.00, and it is from this judgment that this appeal is prosecuted.

Two suits were filed, one by Mrs. Hicks as administratrix, and another by the widow and children. The administratrix bases her claim upon the allegation that the wreck was caused by the negligence of the engineer in charge of the locomotive running the train at an excessive rate of speed, and on the further fact that the said engineer carelessly, grossly and recklessly, while the train was running at this dangerous and rapid rate of speed, suddenly checked the speed of the locomotive. This declaration sets out Hick's earning capacity at $100.00 per month, and that he was the sole support of his widow and children and that he lingered, for several days before he died, in great agony. The declaration claimed $30,000 damages, and it is manifestly bottomed on Section 193 of the Constitution of 1890. The second declaration by Mrs. Hicks, for herself and her children, proceeds upon the theory of the negligence of the defendant company in knowingly employing an inexperienced, unskillful and reckless engineer, as the result of which the train was run at the excessive rate of speed, in view of the condition of the track, and second, upon the negligence of the engineer in that he suddenly and wantonly attempted to check the train; and upon the negligence of the defendant company in having improper and defective appliances, trucks of an improper gauge, so that the wheels did not properly fit the tracks, and flanges on the wheels of the first box car which jumped the track which were worn, defective and unsafe; and in not having good and sufficient brakes and brake-shoes on the car which first jumped the track so that its speed could be controlled, and in not having said car properly equipped with air brakes, etc. This

declaration also claims $30,000 damages, and is bottomed,
74 manifestly, on section 3559 of the Code of 1892, which is a
rescript of Section 193 of the Constitution of 1890, and on chapter 65 of the Laws of 1898, as explained later herein.

We may say at once, and so dismiss this matter, that the cause on the testimony is bottomed chiefly, if not exclusively, upon the negligence of the master in having in its employ a thoroughly incompetent and reckless engineer, and upon the willful and reckless conduct of this engineer in running this first passenger coach, over this new, rough, unballasted road at this excessive rate of speed.

The learned counsel for the appellant set up six defenses, in briefs which we have never seen surpassed, either in ingenuity or profound ability, and which we direct the reporter to set out together with the very able briefs of learned counsel for appellees, in full in order that railroad attorneys having cases of like kind hereafter, may first read these briefs and know whether they should trouble this court with the suits of that sort which they may have in hand. There ought not to be repeated suits brought to this court by appeal, bottomed on the same grounds. Once we have determined a cause, the principles in that cause settled, ought to be decisive in all other causes of like nature; and it is because of the exceeding ability and the extreme thoroughness of the briefs of the learned counsel for the appellant, which present, it seems to us, every possible phase that could be given to a case like this, that we thus direct their full publication for the guidance of railroad counsel, and other counsel, in the future, where similar cases arise.

Taking up these defenses in the order in which they are presented, the first is that the injury was an accident, pure and simple. We cannot accept this view. There is nothing improbable, or which might not reasonably be foreseen as logically likely to happen in the connection between negligence, such as here shown, and derailment. It is true that the railroad company could not possibly foresee what particular person might be hurt, or in what particular manner he might be hurt; but that is not determinative. The question is,—ought not the company reasonably to have foreseen that sending its first mixed passenger and freight train over this new, rough, unballasted road at a rate of speed nearly three times its schedule rate, would necessarily result in derailment, or at least would most probably so result? It is said in 21st Am. & Eng. Ency. of Law, at
page 487, that, "In order, however, that a party may be liable
75 in negligence, it is not necessary that he should have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if, by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected."

See also Wharton's Law of Negligence, 1 Ed., sec. 77, and Payne v. Georgetown Lbr. Co. (La.) 42 Sou. Rep., 475.

The section foreman and all his crew are constantly near the tracks, working on them, repairing them, and looking after them

in every way. These section crews are always at work on the track, or so near it that they are liable to be injured by the constantly passing trains at all hours of the day, and it would be a dangerous doctrine, indeed, to establish that persons thus situated, when injured by a passing train, are injured as the result of accident pure and simple.

The second contention of learned counsel for appellant is because no evidence was offered in support of any allegation upon which the claims are based, except the one to the effect that the engineer was running at a dangerous rate of speed, and Section 3559 of the Code of 1892, under which the suit by the administratrix was brought, is violative of the 14th Amendment to the Federal Constitution. Our first observation with respect to this contention is that it incorrectly states the facts is this—that this action by the administratrix is necessarily bottomed not only on the negligence of the engineer in running at an excessively dangerous rate of speed, wantonly and willfully, but, as a necessary corrolary of this, upon the negligence of the master in having, in its employ, this utterly incompetent engineer. We do not deem it necessary to say more than we have heretofore held in Ballard v. Cotton Oil Co., 81 Miss., 507, and in other cases since to show that the 14th Amendment to the Federal Constitution is not, in any way, violated by Section 3559 of the Code of 1892, which was enacted with reference to railroad corporations, grounding liability in this class of causes on the inherently dangerous nature of their business in operating cars by the highly dangerous agency of steam. On the contrary we follow the United States Supreme Court in repeated decisions, pointed out in the case of Ballard v. Cotton Oil Co., in maintaining the const-utionality of this statute relating to railroad corporations. We refer to that case,
and the cases since, and with that dismiss this contention. It
76 is certainly unnecessary to repeat what we have once so thoroughly, and at such great length, pointed out.

The third contention of learned counsel for the appellant is that "It plainly appears that the deceased did not belong to that class of employees for whose benefit Section 3559 of the Code of 1892 and Section 193 of the State Constitution of 1890 were made." Ingenuity and ability have both been exhausted in the effort to maintain this contention; but a close and careful analysis shows clearly that it is artificial and unsound. Perhaps the best answer of all to this contention that Hicks did not belong to a class of employees, the nature of whose employment exposed them to the inherent perils attending the operation of railroad trains, is the fact that he was killed by one of the cars composing the train. *Res ipsa loquitur* again suffices. It is useless to say that Hicks was exposed to no such peril, in the light of the fact that it was just such a peril which resulted in inflicting upon him death. He was killed by the running of the train. Really, the argument is not accurately stated in saying that he was not exposed at all to such peril, but it is, exactly, that the peril was so remote, the danger so unusual, that the consequences to be apprehended from the peril could not readily be foreseen. This is the true gist of the argument presented by the

learned counsel for the appellant reduced to its genuine analysis. And, thus viewed, it is manifest that there really is no question of the construction of Section 193 of the Constitution involved, but a mere question arising under the ordinary general law of negligence, and we have already fully covered this in what we have above said. We may add to this the further statement that the verdict may be properly referred to the general presumption of negligence created by Section 1985 of the Code of 1906, which is as follows, "Injury to persons or property by railroads *prima facie* evidence of want of skill, etc.—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives, or cars of such company, shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employees of railroad companies." The last clause of this section is an amendment of the previously existing law. In other words, Hicks was plainly one of the class of employés under Section 193, exposed, from the nature of his employment, to the perils attending the inherent danger of
77 operating railroad cars. Whilst, at the same time, the verdict here is maintainable under the presumption created by this statute, it is very true, as counsel for appellant say, that it is not instances which are to be classified, but employments. Section 193 of the Constitution, nevertheless, protects the injured employé, not against what he himself is doing, but against what his co-employés, of certain kinds, are doing. The injury is not whether he is, at the time, operating a train, and thus exposing other employés to a peril, but whether, in the discharge of his duty, he is where the negligence of certain co-employés operating the train may injure him. This is the construction we have given to Section 193 in the recent case of Heflin v. Bradford Construction Co., 88 Miss., 362, and this construction is in harmony with the Supreme Courts in the states of Iowa, Kansas, Minnesota and Missouri construing their employé's liability statutes. In the case of Hayden v. Sioux City etc. Ry. Co., 92 Iowa, 227, the court said, "It is true that plaintiff was not engaged in the operation of trains in the sense of being an employé on a train, but his work was along and on a track on which trains were operated, and had especial reference to train movements in the way of keeping the track in repair, and in condition therefor. His work was of the hazardous kind contemplated by the statute." See particularly the note to Jemming v. Great Northern Ry. Co., 1st L. R. A., New Series 693. It was held in Croll v. Atchison etc. Ry. Co., 57 Kansas, 548, that a- employé was, within their statute, one who, while working on a ditch along the track, was struck by a piece of coal from the tender of a passing engine. In another case, to which we make special reference, Keatley v. I. C. R. R. Co., 94 Iowa, 685, it was held that an employé, standing on a derrick platform, used in building a side wall, and killed by the wrecking of a train crossing an uncompleted bridge, was within the protection of the statute in that state. The decedent was a mere water boy having nothing to do in the operation of the road, or in the building,

or repairing, of the track; yet he was exposed to the peril from derailment. See Keatley v. I. C. R. R., 103 Iowa, 283, and the other cases cited in the brief of learned counsel for the appellee. It may be remarked here that there is no contention, since there could be none, that Hicks was not in a different department of labor, from that in which the crew of the passing train was.

The fifth contention of the learned counsel for the appellant is that the court gave an instruction for the plaintiff and denied an instruction for the defendant upon the theory that the plain-
78 tiffs were entitled to the benefit of the presumption created by Section 1808 of the Code of 1892, which is section 1985 of the Code of 1905. We have had this section set out before in this opinion, and refer to it again here. It is perfectly obvious that the amendment to this section was intended, both by the commissioners in the form in which they expressed it in the dummy code, and by the Legislature, in the somewhat different form in which they expressed it in the last clause of the section, to utterly abrogate the construction by this court of said section, as it appeared in Section 1808 of the Code of 1892, in the Trotter case, the Short case, and the Humphries case. That erroneous construction of the statute, as it originally existed in the form of Section 1808 of the Code of 1892, has been, by this Legislative amendment, utterly abrogated. The Legislature was manifestly dissatisfied with the limitation ingrafted upon the plain language of section 1808, by this court in the cases named, and determined to frame a new amendment, which could not be pared away. The code commissioners in the dummy code had amended the section. Sec. 1808 of the Code of 1892, so as to make this presumption attach in favor of all standing in "contract relations" to the railroad. The Legislature made an immaterial change and extended said presumption to passengers and employés. It is perfectly idle in the face of this plain declaration of the Legislature, to argue any further, that employés and passengers are not to be given the benefit of this presumption. It is clear, however, in any possible view, that this particular employé, Hicks, was engaged in a different department of service from the employés on the train who caused his injury; not a fellow-servant at all, and hence we think, under Section 193 of the Constitution, he is clearly within the reason and spirit of this presumption, and entitled to its benefit, whatever may be the true construction, generally, of this section. So that, in no event, could the benefit of this presumption on the facts of this case, be denied to this employé Hicks, such as he was, and situated as he was, and injured under the circumstances under which he was injured. The strongest argument, made by the learned counsel for the appellant, against allowing this section to extend the benefit of this presumption to all employés is, that it might, in certain peculiar cases, result in extending the presumption to cases where the negligence presumed might be that of a fellow-servant. This is not a sound construction of this statute. It would impute to the Legislature absolute folly to give it this construction, and

this we must never do, if it can possibly be avoided. If
79 the purpose of this amendment was to raise, in favor of an injured employé the presumption that the negligence was the negligence of a fellow-servant, this would result, instantly, in no liability; and if this purpose is attributed to the Legislature, it would — convicted of the absurdity of creating a presumption of non-liability, in the effort to create a presumption of liability. As well said by counsel for appellee, "If, in order to avail of the presumption, it *be* necessary for the employé to show that the injury resulted from the negligent act of some employé in a different department of labor, or of some superior officer, etc., then the presumption would be entirely destroyed. It would be yielding to proof. There is never any need for a presumption after proof of liability is completed. Surely, this court will not say that the Legislature meant that where an employé will take the burden of proof, and show that he was, in fact, injured by one of the excepted classes of fellow-servants, he is entitled to the presumption; for the presumption would then be given after it was not needed, and could not have any application; for, as has often been held by this court, when the facts are known, presumptions are to be ignored. Of course it is open to the railroad company always, when the presumption exists, to show that the negligence of a fellow-servant was not embraced in Section 193. In this case, in which we invoke the presumption, it was competent for the defendant to have shown that the negligence, in fact, was the negligence of a fellow-servant, if that could have been shown; but no such effort was made, no such defense was set up or pleaded." So far as the point pressed that there may be cases, in which an employé would be given the benefit of the presumption of negligence, where, on the disclosed evidence, it would appear that the negligent employé was a fellow-servant, it is sufficient to say that it is manifestly the duty of the railroad company to make that showing itself, since it is defensive; and since, when made, it will end, not only presumptions, but the whole case of the plaintiff. And it is further to be said, on this precise point that if there should ever occur the extreme case suggested by appellant's counsel, in which the plaintiff, an employé, should stand upon the presumption of liability given by the statute, when he had within his command the proof showing that the negligence in the given case was the negligence of a fellow-servant, and hence that there was no liability, then it is to be said, with respect to such extraordinary
case—rarely ever possible to happen—that it is better, on the
80 ground of public policy, that the presumption should be given the employé, even in that case, standing upon the presumption alone, without any testimony whatever than that the railroad company should be released from possible liability on the presumption alone, when in nearly every possible case, the company has, itself, the completest and fullest knowledge of how the injury happened, and should produce it in exculpation of itself; and second, that the danger suggested of a fraudulent employé's recovering, on a presumption alone, when he himself has, in his power, the production of the testimony showing how the injury happened, and that

it happened in a way exculpating the defendant, is far more fanciful than real because of the obvious fact that it would always be in the easy power of the defendant company to put the plaintiff himself on the stand and compel him under oath through the testimony within his power, to show the real truth as to how the injury happened. It will never do, in the practical administration of justice, to minimize or pare away the power and value of this presumption bottomed on a great public policy, wise and wholesome, by fanciful conjectures as to what might, in some peculiar case, possibly take place. It is to what will generally, and usually, and ordinarily, happen, in the application of this presumption, that we should look, and not to the dimly possibly occurrence of a fraudulent suit, such as suggested. Indeed, we dismiss this contention of appellant with the emphatic declaration that none of the difficulties in which the court has been involved, by the ill-considered announcements in the Trotter, the Short and the Humphries cases, to be found respectively in 60th Miss., 442, 69th Miss., 848 and 83rd Miss., 721, would ever have occurred, if the court, disregarding the awkwardness of the language of the Legislature, in Section 1808 of the Code of 1892, and looking, as it ought to have looked, to the spirit and purpose and scope of the section, had held, as we now hold, that the statute was intended to establish a rule of prima facie evidence of liability on the part of the company itself, in favor of those named in the statute. It should have been interpreted precisely as if it had been written thus, "Proof of injury inflicted by the running of locomotives or cars of such company shall be prima facie evidence of liability on the part of the company." That was plainly the thought and the purpose dominating the statute, and that purpose should have been given effect, and the awkwardness of the Legislative language disregarded. To all which it may be added that since the
81 proof clearly shows the negligence of both the master and the engineer caused the injury, appellees were under no necessity of invoking this presumption at all.

The sixth contention of the learned counsel for the appellant is that the court should have given a peremptory instruction for the appellant. This, of course, is untenable.

The last and most serious contention of the learned counsel for the appellant, No. 4 in the order as assigned, is that the two causes were improperly consolidated. This contention rests mainly upon the proposition that under Section 193 of the Constitution, and under Section 3559 of the Code of 1892, which is a mere rescript of said section 193 of the Constitution, no action could be brought on behalf of an employé who had been killed, except by his personal representative, that is to say, his executor or administrator, as held in the case of Hunter v. R. R. Co. 70th Miss., 471, and the argument of the learned counsel proceeds mainly upon the theory that the Hunter case is still the law. This is an entire misconception. The Hunter case was practically overruled in the Bussey case 79th Miss., 597, and expressly overruled recently in the case of Y. & M. V. R. R. Co. v. Washington et al., Sou. Rep. vol. 45, No. 10, page 614. In other words, it was perfectly competent, under section 193

of the Constitution, and, of course, under Section 3559 of the Code of 1892 for the widow and children, that is to say, the legal representatives of Hicks, to have brought the suit which they did bring here to recover what he was worth to them as a bread-winner. It would also have been competent for Mrs. Hicks to have brought a suit as administratrix, under the same sections to recover the damages sustained by Hicks himself, but for the provision for but one suit in chapter 65 Acts of 1898, as shown hereinafter. Learned counsel for the appellant admit, in their second brief, that if the two suits were necessary, and the administratrix could have sued for all damages claimed in both suits, or if the widow and children could have sued for all such damages, then they are willing to concede that they were not prejudiced by the consolidation. This concession ends the controversy on this point, for there are two views, on either of which it is clear that not only were two suits unnecessary, but that only one could be instituted. Now as to the first of these views. When this suit was instituted chapter 65 of the Laws of 1898, now Section 721, Code of 1906, was in full force. That chapter was as follows: "Section 1. Be it enacted by the Legislature of the State of Mis-
82 sissippi. That the act of the Legislature of said State, approved March 23rd, 1896, being entitled to amend section 663 of the annotated code of 1892, as to actions causing death, and exempting damages, recovered for personal injuries, be amended so as to read as follows: Chapter 86.—An Act to amend Section 663 of the annotated Code of 1892, as to actions for causing death, and exempting damages, recovered for personal injuries.

Section 1. Be it enacted by the Legislature of the State of Mississippi, That Section 663 of the annotated code of 1892 be so amended as to read as follows:—Whenever the death of any person shall be caused by any real wrongful or negligent act, or omission, or by such unsafe machinery, way or appliances, as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow and children, or both, or husband, or mother, or sister, or brother, the person or corporation, or both, that would have been liable if death had not ensued, and the representative of such person shall be liable for damages, notwithstanding the death, and the fact that death is instant-ious shall, in no case affect the right of recovery. The action for such damages may be brought in the name of the widow for the death of the husband, or by the husband for the death of the wife, or by a parent for the death of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one suit for the same death, which suit shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits. In such action the party or parties suing shall recover such damages as the jury may, taking into consideration all damages of every kind to the decedent and all damages of every kind to any

and all parties interested in the suit. Executors or administrators shall not sue for damages for injury causing death except as below provided; but every such action shall be commenced within one year after the death of such deceased person.

Section 2. This act shall apply to all personal injuries of servants or employés received in the service or business of the master or employer, where such injuries result in death.

Section 3. Damages recovered under the provisions of this
83 act shall not be subject to the payment of the debts or liabilities of the deceased, and such damages shall be distributed as follows: Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; damages for the injury and death of a married woman shall be equally distributed to the husband and children, and if she has no children all shall go to the husband; if the deceased has no husband nor wife, the damages shall be distributed equally to the children; if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brother and sisters, or to such of them as the deceased may have living at his or her death. If the deceased have neither husband or wife or children or father, or mother, or sister, or brother, then the damages shall go to the legal representatives, subject to debts and general distribution, and the executor may sue for and recover such damages on the same terms as are prescribed for recovery by the next of kin in Section 1 of this act, and the fact that deceased was instantly killed shall not affect the right of the legal representatives to recover.

Section 4. All suits pending in any court at the time of this approval of this act and which were also pending at the time said chapter went into effect, shall not be affected by any of its provisions; but all such suits shall be conducted and concluded under the laws in force prior to the time of the approval of said act, on March 23, 1893. Approved January 27, 1898.

This chapter has been recently constructed by us in the case of Pickens v. I. C. R. R. Co., Sou. Rep. Vol. 45, No. 14, page 868, in a case in which the suit was brought to recover damages for the death of one not an employé, that is to say, under our statutory provisions embodying the doctrine of Lord Campbell's Act which had their final expression at that time, and when this present suit was brought, in said chapter 65, page 82, of the Laws of 1898. In that case we said, "It is apparent from the act cited that there can be but one cause of action for any injury producing the death of any party. This statute was enacted for the purpose of uniting in one suit all causes of action which might have heretofore existed for any injury whereby the death of the party was produced. Whatever may have been the common law rule upon this subject, this is now the rule in
this state under the act and section above quoted. The law
84 expressly provides that, 'whenever the death of any person shall be caused by any real, wrongful or negligent act,' etc., 'as would, if death had not ensued, have entitled the party injury or damaged thereby to maintain an action and recover damages in

respect thereof,' etc., and then proceeds to say that 'in such action'—that is to say, in an action for damage for the death of a person caused by a wrongful or negligent act, etc.—'the party or parties shall recover such damage as the jury may, taking into consideration all damage of every kind to the decedent and all damage of every kind to any and all parties interested in the suit'. This chapter provides expressly that there shall be one suit, and that in that suit there shall be one recovery, and that recovery shall be for all damages of every kind to the decedent and all damage of every kind to any and all parties interested in the suit".

That act further provided, we may now add, that there might also be an action brought by the personal representative, that is to say, the executor or administrator of the deceased, not an employé, and authorizes the recovery by the personal representative to be for all the damages both to the decedent and to the widow and children, that is to say, authorizes the personal representative to recover for the legal representatives. But it added two restrictions in respect to this suit by the personal representative; first that suit could never be brought conjointly with the suit by the widow or other legal representatives, but could only be brought when there were no next kin at all; and secondly, the act provided that in that case the amount recovered by the personal representative should be subject to debts. In other words, the cause of action given to the personal representative, so far as recovery is concerned, is co-extensive in all respects with that given to the legal representative; and that act further provided that the damage for injury and death, recovered, should be exempt to the wife and other legal representatives, and should be distributed as specified in this statute, and finally, and this is a most important provision, the second section of the act provided, expressly, as follows, "This act shall apply to all personal injuries of servants or employés received in the service or business of the master or employer, where such injuries result in death." Now the first view which we have above referred to is this, that this chapter 65 with all of its rights and remedies—the last expression at the time of the institution of this suit of the doctrine of
85 Lord Campbell's Act, intended for those not employés— is, by Section 193 of the Constitution, itself, made directly applicable to and available by the employés, empowered by said Section 193, to recover in the states of case therein named. This view was first presented to this court in the case of I. C. R. R. Co. v. Fannie Williams, et al., recently pending here, but compromised by Messrs. Green & Green, attorneys of record for appellee, in a brief of surpassing ability which ought to be in the hands of every lawyer in the state. We gave the view presented by that brief the most careful consideration at that time, and would then have announced our concurrence in it had the case not been settled. We now quote from that brief the following clear statement of this view which we now adopt as the true construction of Section 193. "'Every employé of a railroad corporation shall have the same rights and remedies for an injury suffered by him by the act or omission of said corporation or its employés as are allowed by law to other persons not

employés' in the specified cases. 'Where death ensues from an injury to an employé the legal or personal representative of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons * * * and this section shall not be construed to deprive an employé of a corporation or his legal or personal representative, of any right or remedy that he now has by the law of the land. The legislature may extend the remedies herein provided for to any other class of employés'. By the first paragraph, injured fellow servants, who live, in the specified cases, are to have the same rights and remedies as are allowed by law to persons not employés.

This places fellow servants, in the specified cases, in the same legal position as if they were not fellow servants, but were other persons not employés. Their rights and remedies are to be the same 'as are allowed by law'. Not those now allowed by law only; but their rights and remedies are to follow and be governed by the rights and remedies by law applicable to such other persons. If the rights and remedies of other persons are extended or restricted by law, then those of fellow servants in the specified cases, and in the same degree, are to be extended or restricted. The rights and remedies of both are to be such 'as are allowed by law'. There is no limitation in this language upon the power of the legislature to extend the rights and remedies of persons not employés. The legislative power is unrestrained in this regard. But if there is allowed by the legislature, by law, any other rights and remedies, then, those
86 of fellow servants follow, for they are to 'have the same rights and remedies as are allowed by law to persons not employés'. The power of the legislature to extend the rights and remedies of employés, even irrespective of other persons, was held to exist in Bussey's case, 70 Miss., 810.

The classification of the rights and remedies of fellow servants in the specified cases, and of the persons, for torts is thus made the same; and after thus made *the same by the constitution, it would be beyond the power of the Legislature to create a new right or remedy for other persons*, in this regard, that would not extend to fellow servants in the specified cases.

The legislature would have power, toties quoties, to change by enlargement or restriction, the rights and remedies of persons not employés for injuries; and if it does change them, then as a constitutional sequence, those of fellow servants in the specified cases are changed accordingly. Therefore, when the rights of other persons were changed by the enlargement of the rights under Section 1510 (Lord Campbell's Act), Code 1880, by Chap. 65, Acts 1898, by the mandate of the Constitution, those of fellow servants, in the specified cases, were enlarged accordingly. This would be true whether the fellow servants were referred to in the Act or not; for the creation of a right or remedy for other persons not employés, by this self executing provision of the Constitution, ipso facto, extends to fellow servants in the specified cases. But the legislature, mindful of this mandate, and to exclude a conclusion, enacted Section 2 of Chap. 65, extending the act to employés of corporations. In this

aspect, it is immaterial that the legislature undertook to amend Section 193, by Chap. 66, Acts 1898; and whether Chap. 66 is constitutional as class legislation or not, Chapter 65, propria vigore, became a part of the right and remedies 'allowed by law' to other persons, and hence, to fellow servants in the specified cases; and Chapter 66, so far as the rights and remedies allowed by Chapter 65, and Section 193, were concerned, was superfluous and unnecessary.

The result of the constitution giving the same rights and remedies to fellow servants in the specified cases as to persons not employés is that the common law remedies for injuries to persons not employés, as well as any legislative rights or remedies created in behalf of said other persons, would, in the specified cases, be extended to and be allowed to fellow servants. 'As are allowed by law' means by common or statutory law. It is to be noted that it does
87 not confine its beneficent effects (made necessary as constitutional legislation because of the many failures of the Legislature to act, Bussey's case, 79 Miss., 607) to such rights and remedies as are now allowed by law to this class of persons not employés. To show that it was not intended to take away the rights and remedies of any employé then existing, but to extend the same, a subsequent provision of the section declares,—'and this section shall not be construed to deprive any employé of a corporation, or his legal or personal representative of any right or remedy that he now has by the law of the land'. It was necessary to enact Section 193, for the then settled construction of Section 1510, Code of 1880, Lord Campbell's Act, was that it did not affect the fellow servant rule. 8 Am. & Eng. Enc. Law, 2nd Ed., 867.

The next paragraph of Section 193, after defining the specified cases in which the fellow servant does not assume the risk of the negligence of fellow servants, nor of defective machinery or appliances, provides 'where death ensues from an injury to an employé, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons'.

Thus the legislation applicable to persons not employés, where death results from an injury, becomes extended to the legal or personal representatives of an employé. The first clause of Section 193, supra deals with the rights and remedies of employés where death ensues from the injury. At common law there was no cause of action for a death, and no survival of a cause of action for a tort resulting in death. Railroad v. Pendergrass, 69 Miss., 430-1.

The Legislature, following Lord Campbell's Act, had enacted sections 1510, 2078 and 2079, Code of 1880 (sections 663, 1916 and 1917, Code of 1892) for 'other reasons' and had unlimited power to make extensions or restrictions of legislation on this subject. The constitutional intent was that whatever legislation, whether it affected the rights or the remedies, might be enacted for other persons or employés, should be applicable to employés where death ensued. The constitutional convention, as said in the Bussey case, took this legislation in hand with a view to secure the legal or personal repre-

sentative of employés of corporations the same rights and remedies for injuries resulting in death 'as are allowed by law to such representatives of other persons'. They were all to be classed alike,
88 and the legislature was not allowed 'to make fish of one and fowl of another'. As stated, supra, commenting on this identical language in the first clause, the legislature was not limited or restricted in its power to legislate on this subject as to other persons, but the mandate was, that whatever right or remedy is allowed by law to the legal or personal representatives of persons not employés, where death ensues, shall extend to employés. This is a constitutional rider upon all legislation, present and future, on this subject matter."

Section 193, we may now point out, did not define what the rights or what the remedies were which it provided for the particular employé if he lived, or for his personal or legal representatives if he was killed. The only attempt at definition of either these rights or these remedies is to be found in this phrase, "Every employé of a railroad corporation shall have the same rights and remedies * * * as are allowed by law to other persons not employés", and further down in the said section in these words "Legal or personal representatives of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons". "The same rights and remedies", says the section, "as are allowed by law to persons not employés", and to the legal and personal representatives of persons not employés. "The same rights and remedies"; what rights and remedies; the same as are allowed by law to persons not employés, etc. In other words, when you come to ascertain what the rights and what the remedies precisely are, you are to look for the legislation which allows persons not employés to sue, and having found that Section 193, proprio vigore, in self-executing fashion, ipso facto, makes *a* all such rights and remedies, then or thereafter allowed by law, available to and useable by the particular employés empowered to sue by Section 193 in the states of case therein named. Nor is there any well founded objection against this view to be worked out of the last clause of Section 193 of the Constitution which provides that "The Legislature may extend the remedies herein provided for to any other class of employés", because, obviously, it is thereby meant that when the Legislature makes such extension to other classes of employés, the extension shall carry to such other class or classes of employés the rights and remedies secured by Section 193 in the same manner and to the same extent precisely that Section 193 itself gave the particular employés of railroad corporations named in it. Nor *os* there any merit in the objection made
89 by the learned counsel for the appellant that this view is in conflict with the case of Bussey v. R. R. Co., 79 Miss., 597. On the contrary, as said in the brief of Messrs. Green & Green, attorneys, from which we have so liberally quoted, "In all of its essential elements this interpretation is supported in the Bussey case, and in the Ballard case. In the Y. & M. V. R. R. Co. v. Schragg, 84 Miss., 125, there is favorable support found for this interpretation of chapter 65". This statement of the eminent counsel is strictly cor-

rect. The Bussey case was dealing with a wholly different phase of Section 193 from that here involved. The specific object of that decision was to discriminate carefully between the provisions of our law embodying the doctrines of Lord Campbell's Act and the provisions of Section 193, and the subsequent statutes seeking to carry out its purpose, which related alone to the rights and remedies of the special employés of railroad corporations named in it. We held in that case that all the provisions of law embodying Lord Campbell's Act related to those not employés, and that Section 193 and its consequent statutes related to certain particular employés named in said section. We carefully pointed out that these two schemes,—one wholly statutory and the other constitutional and statutory, were wholly distinct from and independent of each other so far as their origin, their history, and their purpose were concerned; but it does not at all logically follow from this pointing out of the difference between the two schemes, that Section 193 of the Constitution could not and did not, ipso facto, provide, without any legislation whatever, that all legislation affecting the rights and remedies of those not employés, whether enlarging or restricting those rights and remedies, should immediately, upon the passage of such legislation, at the time of the adoption of the Constitution or thereafter by virtue alone of this very section of the Constitution, enure to and become vailable by the class or classes of employés named in said Section 193, or thereafter added, in pursuance of its last clause, by the Legislature. The difference in the origin of the two schemes, the difference in their history, and the difference in the nature of the actions provided by them respectively, in no sort of way, prevented the Constitution from providing that all the remedies and rights given to persons not employés should become instantly available by and enure to that class of employés embraced either in said Section 193 itself, or in any subsequent legislation extending the rights and remedies to other employés, as provided in the last clause of said section. It follows, inexorably, from the phrase "same rights and same remedies",
90 that there never can be a time, while Section 193 of the Constitution is in force, when the rights and remedies given to those not employés shall be*en* in any wise, different from the rights and remedies conferred by Section 193 of the Constitution on the employés named therein. It must be clear from this analysis of Section 193 of the Constitution that there is nothing in the point as to the impropriety of the consolidation of the two suits. It is simply to be said that the suit by the administratrix was entirely superfluous and improper, and the learned counsel for appellant very properly admit that in this view they cannot claim that the consolidation preiudicially affected appellant in any wise.

We pass now to the second view, on which all it is seen that only one suit could be instituted—that by the widow or the widow and children—and that that suit was to be instituted under and governed in all respects by this same chapter 65, and that view is this,—that section 2 of said chapter 65 expressly declared that that act should apply to all personal injuries that servants *or* employés received in the service or business of the master or employer where such injuries resulted in death. In other words, this Section 2 of Chapter

65, which was in force when this suit was brought, entirely independently of Section 193, attempted to confer, expressly, all the benefits of Chapter 65 as to rights and as to remedies, upon the employés of the master where the injuries, as here resulted in death. We expressly pointed out in the Bussey case at page 609, that the language of Section 2 could not be read as blank paper, and held that it expressly applied the principle of Lord Campbell's Act to employés where the injuries resulted in death. If, therefore, it could properly be said, as, manifestly, it cannot, that the construction we have given Section 193 on this subject in the first view presented above was erroneous, then undoubtedly this section 2 expressly clothes this employé of this master with all the remedies and all the rights provided by Chapter 65 of the Acts of 1898. If it be said that this was taking the last expression of the principles of Lord Campbell's Act formulated in said Chapter 65 relating to persons not employés, and clothing persons who were employés with the same rights and the same remedies, the answer is *ita lex scripta est;* even thus Section 2 of Chapter 65 is written, and that is for us the end of the law on the subject. It is doubtless true that the Legislative dealing with these two different schemes—Lord Campbell's Act for those not employés, and Section 193 of
91 the Constitution and the statutes in pursuance thereof for certain employés named in Section 193—has been characterized by the most absurd and irrational confusion of the two statutes, one with the other. For example, Section 663 of the Code of 1892 was the expression in that code of Lord Campbell's Act relating to persons not employés, and yet Chapter 66 of the Laws of 1898 which related exclusively to the employés named in Section 193 of the Constitution, is a copy—an actual copy—of said Section 663 of the Code of 1892, relating alone to persons who were not employés. Again, this very chapter 66 of the Laws of 1898 contains the exact words, as we have said, of Section 1510 of the Code of 1880, (Section 663 of the Code of 1892) as to the person in whose name the suit is to be brought, as to the measure of damages, and as to the distribution of the damages, and these words are interpolated in said Chapter 66 between the words of Section 3559, Code of 1892, as copied from Section 193 of the Constitution. Manifestly, the Legislature had no proper conception of the subject matter of these two different schemes of legislation with which they were dealing, and it is no particular ground of criticism of the Legislature when the intricacy and difficulties of the subject are considered. But it must certainly be ground for great satisfaction that under the first view which we have above set out, the interpretation which makes Section 193 self-executing, it will never be, whilst that Section remains in force, within the power of the Legislature, by any legislation as to employés, to affect in one way or the *the* other their rights or their remedies; but that those rights and those remedies shall remain whilst that section of the Constitution lasts, the same exactly, whether restricted or enlarged, as the rights and remedies allowed by law to those not employés.

There is just one other criticism about the Bussey case made by Messrs. Green & Green in their masterly brief, hereinbefore men-

tioned, which we care to notice, in order to point out the fallacy involved in the criticism. It is said by them in that brief that it was inaccurate to say, as we did in the Bussey case, that Section 193 of the Constitution created a new cause of action. We said this not meaning thereby that there never had been a time in the history of our jurisprudence when the cause of action provided by Section 193 had not existed, for, manifestly, it had existed at the common law and remained the rule until Lord Abinger in 1837 invented, as counsel correctly say, the fellow servant doctrine, in Priestly v. Fowler,
92 3 Mees & W., page 1, and in this country until that case was followed, in 1838, by Murray v. S. C. R. R. Co. 1st McMullan, 385, and in 1842 by Farwell v. Boston R. R. Co., 3 Met., 49, and in 1873 in this state by R. R. Co. v. Hughes, 49 Miss., 258. But during that long sweep of time from 1837 to 1890 the causes of action provided for in Section 193 had been abolished and did not exist at all in the jurisprudence of England or America; and what we meant in saying that Section 193 created these new causes of action was that they were, for the first time, by that section, made causes of action, and it was proper enough to speak, therefore, of Section 193 as creating these causes of action in that sense. Causes of action which had existed at the common law and which had been abolished since 1837 in England and since 1838 in this country, and which had never had in the United States any existence since 1838, may certainly, with all propriety, be spoken of as being created, or if that term pleases better, re-created, by Section 193 of the Constitution.

We have given to this cause the most painstaking and protracted and profound consideration. It has engaged the solicitude of each member of the court because of the tremendous scope and sweep of the principles involved in its decision, and we are, after the fullest consideration thoroughly satisfied of the correctness of all the views which we have in this opinion announced.

It follows that the judgment of the court below was correct, and it is, therefore,

Affirmed.

93 In the Supreme Court of Mississippi, March Term, 1908.

No. 12839.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY
vs.
MARY ALICE HICKS'S ADMINISTRATOR et al.

Suggestion of Error.

The appellant suggests error in the decision of this cause as shown by the very great opinion of the court rendered through the Chief Justice on April the 20th last.

We do not ask the court to enter again upon the consideration of the principal question decided, the one of greatest importance,

the one which has all these years been calling for just a solution as the court has given it: that section 193 means that employees for whose benefit it was ordained and their executors, administrators and heirs shall have the same right and remedies as other persons not employees and their heirs, executors and administrators have, and that legislation for persons in general is legislation for such employés, and that their is really no necessity for "two legislative schemes". Of this construction of section 193 we make no criticism. We think it the final result of mature and correct re-soning, and that this construction should firmly take its place in the jurisprudence of this state, there to remain.

There are other parts of the opinion, however, which, in our humble judgment, are vulnerable, and as to which we respectfully suggest that the Court erred.

I.

Beginning on the first page of the opinion, it is said:

"We think the testimony shows, with sufficient clearness, that this injury was due to the incompetency of the engineer, which would make the master itself liable, and the excessive rate of speed of this first passenger train over this new, unballasted, and rough road. There can be no reasonable controversy as to the injury being due to these two causes. The incompetency of the engineer is manifested by the very nature of the occurrence.

Res ipsa loquitur fits in perfectly as showing his gross incompetency.

This holding of the Court we submit is erroneous for several reasons.

94 In the first place, the case was not tried on this issue. The issue upon which it was tried was whether the Engineer was guilty of negligence which caused the train to leave the track. That this was the only issue submitted to the jury, the only issue which was tried below, the only ground upon which Court and Counsel consider that there was a possibility of holding the Railroad Company liable, is manifest from instruction No. 9 given for the defendant:

"The Court instructs the jury for the defendant that although you should believe from the evidence that the engineer in charge of said train was running it at a high rate of speed, and that such act caused the injury complained of, yet, unless you further believe that the engineer was negligent in running the train as he did, then you should find for the defendant."

Besides, the Court will see from Briefs filed by Counsel for the appellees here, there is really no reliance upon anything except the negligence of the engineer in running the train at too great a rate of speed over a new track. And no attempt was made to prove any other negligence.

In the second place, it does not, cannot follow that the master was negligent in the employment of an engineer simply and only because that engineer was on one occasion negligent, or even reckless. That the train jumped the track might necessarily prove that

there was negligence somewhere. The rule *res ipsa loquitur* applies to this extent. That the train left the track means that somebody was negligent. But this fact alone could not justify the conclusion that the engineer was reckless, and also, in addition thereto, that the Company was negligent in employing this engineer. A master is not liable on the ground that he had in his employment a reckless and incompetent servant unless he knew of such incompetency, or by the exercise of reasonable care in making the employment he would have discovered the character of the person being employed. That an engineer was negligent on one occasion would not even mean that he was generally incompetent and reckless. This might have been the only time he had ever been negligent or reckless. If we should even go so far as to say that the negligence of this occasion was so great as to justify the inference that he was an incompetent employee, we could not go still further and conclude that his incompetency was known to the master at the time he was employed or that the master had kept him in its employment after his incompetency was discovered.

95 In determining whether the master was negligent in employing a given servant, a great many things are to be considered. The inquiry would go to information available to the employer at the time the contract of employment was entered into. The bodily qualities; the mental qualities; the disposition of the employee; the habits of the employee; the previous experience of the servant; the age of the servant; the record and reputation of the servant. If a master inquire into all these matters and his information is favorable to the person employed, he cannot be held liable for the employment of an incompetent servant. If he has exercised reasonable diligence in finding out the character of the man he is employing, he is not to be held responsible if it develops that the employee is incompetent. Does the Court mean to say that from the mere fact that this engineer was on this one occasion negligent and reckless, it may be concluded (1) that he was incompetent; and (2) that the master knew he was incompetent, or by the exercise of reasonable diligence might have known it? We are here dealing only with the application of the doctrine of *res ipsa loquitur*. There is a presumption too that the master was careful in the selection of his servant. Wabash R. R. Co. vs. McDaniel, 27 Law Ed. 605, 608, 107 U. S., 454. The burden was upon the plaintiff to show that the master was negligent in the employment of his servant, if it was intended to rely upon this allegation in the Declaration. This cannot be proved simply by showing that the employee in question was negligent on one occasion. Every employee is negligent sometimes. Any railroad man is liable at times to commit negligent acts. Any railroad man will, at times, commit acts which afterwards may be classified as grossly negligent acts, and it can make no difference how negligent or reckless the act may be, it will not justify the far off inference that the servant was of a reckless and incompetent character and that the master knew about it.

II.

As to whether a trackman is one of the employees protected by section 193 of the Constitution the Court says, "It is very true * * * that it is not instances which are to be classified but employments", and again the Court says that it is a complete answer to the argument that Hicks was not engaged in a dangerous
96 employment that he was actually killed by a running train. Is not this classifying instances and not employments? Does it follow necessarily that Hicks was engaged in a dangerous employment from the mere fact that he was killed while engaged in that employment? There are few businesses in which one may be engaged where one does not run some risk of injury. Men get hurt in building houses, but it could not be said that this business is inherently dangerous. Telegraph operators with their offices near the tracks may be run into at times and killed by a derailed train, but does this mean that a telegraph operator is engaged in a dangerous business, or that he is subjected to the hazards peculiar to railroading? The Court held in Bradford Construction Co. case, that Section 193 was intended for the protection of those employees whose employment exposed them to the hazards peculiar to railroading. But the construction now given to section 193 will extend its benefits to all employees who are injured by running trains. This, too, regardless of the character of employments of the injured person. The Court says: "The inquiry is not whether he is, at the time, operating a train, and thus exposing other employees to a peril, but whether, in the discharge of his duties, he is where the negligence of certain co-employees operating the train may injure him."

We have never contended that the injured employee must be himself operating the train, or must be on a train. But our contention is that the employment itself must be such as to subject the employee to the dangers peculiar to railroading, in such sense as to make his position inherently dangerous, and make his safety dependent upon the care of others. And we submit that it cannot possibly be conclusive of the inquiry as to whether an employment is inherently dangerous that an injury was caused by a running train.

III.

And we submit that section 1985 of the Code of 1906 has no place in the decision of this case. The facts were all shown. We have understood that the Court has always held that where the facts themselves are shown to the jury, there is no necessity to invoke any presumption. The plaintiff offered a multitude of
97 witnesses to show that the engineer was running at a reckless and dangerous rate of speed over a new track. (This was not the first train. It was among the first. It was not in fact the first and the evidence does not show that it was the first. There were perhaps dozens of passenger trains run over this very track before this one.) These were eye witnesses. All facts available were brought into Court. We do not understand how under the pre-

vious decisions of this Court the plaintiff may show the facts and prove one kind of negligence and yet at the same time depend upon the presumption to prove some other kind of negligence.

And then, too, the construction now given to the statute makes it a rule of substantive law and not a mere rule of evidence as it was originally intended. As this statute is now construed, plaintiff may recover of railroad company upon facts which would not justify a recovery from any other corporation or any other individual under the sun. Instead of it creating a mere presumption that persons who were in charge of the running train were negligent in the handling of the train had caused the injury, the Court now makes it a presumption not of negligence simply upon the part of these employees, but a presumption of absolute liability upon the part of the company. Under such a presumption, whether the defendant is really liable or not, it must pay. Whether it has committed any wrong or not, it must pay. Even though the plaintiff himself is the guilty person, still the company must pay. In other words, a rule of liability on the part of railroad companies is created which does not apply to any other corporation or individual. This construction of the said section 1985 of the Code of 1906, we respectfully submit, makes it violative of the fourteenth amendment to the Constitution of the United States in that it denies to railroad corporations the protection of the laws and dprives them of their property without due process of law. It is this point which we wish especially to call to the attention of the Court by this suggestion of error. This statute is peculiar to Mississippi so far as we have been able to find. Under the construction now given it, whenever an accident happens, unless the Company can affirmatively show that it is guilty of conceivable wrong that could have caused the
98 injury, then it must be held liable. In order to exonerate itself it must negative the existence of every fact or condition that could have contributed to the accident. In a case like the one at bar, the engineer, for an instance might have been running rapidly under the orders of the conductor. The conductor might himself have been an incompetent employee. The Company itself might have been negligent in the employment of this conductor. The train dispatcher might have been at fault; he might have ordered this train to be run at a rapid rate of speed. The deceased himself might have left something on the track that caused the train to be derailed; one of the section hands might have left something on the track that caused it to be derailed. The flanges on the wheels of the car that first jumped from the track might have been worn. The trucks might not have been of the same guage with the track. The engine itself might have been defective so that the engineer could not control it. In the original construction of the track loose joints might have been left. In order to exculpate itself in the face of this presumption it would have been necessary for the defendant to disprove the existence of all these conditions and every other one that ingenious counsel, Court or jury might conceive of as a possible contributing cause of the accident. This is an immense burden put on a defendant in any and all cases. It shifts the bur-

den of proof to the defendant in railroad cases where persons are hurt by running trains. This is not done where any other corporation or any individual is the defendant. It denies to railroad corporations the benefit and protection of the laws which may be availed of by all other classes of business and corporations in our Courts. It means that railroad companies must pay for every injury whether to trespassers or not and whether any of its employees has committed a wrongful act, and whether it is liable or not. We respectfully submit that this construction of the said statute makes it violative of the fourteenth amendment to the Federal Constitution in that it denies to railroad corporations the equal protection of the laws, and deprives it of its property without due process of law.

99 Statutes making railroad companies liable for all damages resultin- from fires set out by sparks from locomotives have been held consistent with the said provisions of the Federal Constitution. A Missouri statute of 1887 which declared that "each railroad corporation owning or operating a railroad in this state shall be responsible in damages to every person or corporation whose propermay be injured or destroyed by fires communicated, directly or indirectly, by locomotives engines in use upon the railroads owned or operated by such railroad corporations and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it and may procure insurance thereon in its own behalf for its protection against such damages was held constitutional in St. L. & S. F. R. R. Co. vs. Matthews 165 U. S. 1, 41 L. Ed. 611, an act of the legislature of Kansas of 1885 is as follows: "Sec. 1 being enacted by the legislature *by* the state of Kansas: That in all actions against any railway company organized or doing business in this State, for damages by fire, caused by the operating of said railroad, it shall be only necessary for the plaintiff in said action to establish the fact that said fire complained of was caused by the operating of said railroad, and the amount of his damages (which proof shall be prima facie evidence of negligence on the part of said railroad): Provided, that in estimating the damages under this act, the contributory negligence of the plaintiff shall be taken into consideration.

SECTION 2. In all actions commenced under this act, if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment. Sess. Laws 1885, Chapters 155, 258.

In Atchison T. S. F. R. Co. vs. Matthews, 174 U. S. 96, 43 L. Ed. 909, the supreme court of the United States held this law to be constitutional after very th-rough consideration of it.

These statutes were upheld as police regulations to protect property against fires. Persons owning property along the railroad
100 are in no way to blame for the escape of fire from locomotives; and the railroad Company may not be at fault; but it is better that the railroad, for whose benefit the trains are run and at whose instance they are run should bear the loss. It should so use its property as not to injure the property of others along the right of way. There

was nothing wrong with the classification made for the purpose of this legislation affecting railroad companies alone. There was no other business which required the running of steam locomotives through the country emitting fire to be carried by the wind. Railroad companies are engaged in a business peculiarly apt to set out fires and could justly be put into a class by themselves for the purposes of such legislation.

In Railway Co. vs. Humes, 115 U. S. 512, 29 L. Ed. 463, the supreme court of the United States had before it a Missouri statute which required railroad companies to fence their tracks and made such corporations liable in damages for double the value of any live stock killed where sufficient fences were not erected, as provided by this statute, to keep such animals off the tracks. The court upheld this statute.

But in the case at bar it matters not whether a railroad company has violated any law or any duty it owed to any individual.

It may be running its trains carefully and skillfully. It has the right, as is generally conceded, to use its tracks in a proper and legal way. But under this construction of Sec. 1995 if it does any damage to any individual or to any property, it is liable unless it has within its possession the information with which its liability can be disproved.

In R. R. Co. vs. Moss, 60 Miss. 641, our court held an act of the legislature void which required any courts to which an appeal might be prosecuted in a suit between a citizen of this state and a corporation, upon the affirmance of the judgment appealed from, to assess against the appealing party a reasonable attorney's fee to be paid to the attorney for the appellee. This court said "It is partial and discriminating against *classes of litigants*, denying them ac-
101 cess to the appellate courts on the same terms, and with the same incidence as other litigants who may be plaintiffs or defendants in actions for damages. It is not applicable to all suitors alike in the class of actions mentioned by it."

The Supreme Court of the United States has justified laws making Railroad Companies absolutely liable for damage done by fire as police regulation: and it has upheld laws repealing the fellow servant doctrine in favor of certain employees on the ground that railroad employees so favored are engaged about a dangerous business, a fact which warranted a classification putting railroad companies into a class to themselves for the purpose of such legislation. But the statute here in question takes the employees so favored along with all other persons who may have causes of action against railroad companies to recover damages to persons or property occasioned by running trains and make it easier for such persons to establish their claims against such *corporations* than it is to establish a claim against any other defendant. What difference is there between railroad companies and persons and corporations engaged in other businesses which justifies this classification? Railroading is dangerous. The element of danger peculiar to it is held to be such a difference between it and other enterprises as to warrant the enforcement of a certain rule of liability in favor of employees

whose situation exposes them to these peculiar dangers, which cannot be used by other employees of railroads, nor by the employees of other persons and corporations. But in the classification for the enactment of the fellow servant laws the element of danger may properly and reasonably be regarded as a difference which calls for different rules of liability. A railroad employee on one train of cars is dependent for his safety upon the care of employees of the same master on another train of cars or about another piece of work or in a different department of labor. Since his position is so perilous it is proper that he should be protected by rules of law which do not protect employees of other corporations or persons engaged in other businesses. But how can this element of danger in railroading justify a special rule of law or of evidence which makes it easier to prove a case against a railroad than a case against
102 any one else? The dangerousness of the business does not make it more difficult for an injured person to prove how he was hurt. It is no more difficult to prove how an injury happened when it was inflicted by a railroad train than it is to prove how it happened when occasioned by any other piece of machinery.

In other words the inherent danger of railroading *it* not a matter to be taken into consideration in the enactment of rules of evidence or of law pertaining to the enforcement of rights of action for injuries inflicted by running trains. The "difference" between railroad companies and other persons and corporations in this regard does not bear a reasonable and just relation to the subject in respect of which the classification is proposed, and therefore such classification is arbitrary.

It will not do to say that railroad corporations are represented on the ground usually by their employees and that the information is therefore in the hands of such employees. This is true of all corporations. It is a rare case indeed where the master is present. The corporation itself, whatever the enterprise, is rarely present through one of its officers. The owners of the great saw mills of *of* this country and of the oil mills and steam boats and logging roads are rarely present superintending at first hand the work which is being done for them their employees are present when an accident happens. Railroad companies are in no better position to get exclusive possession of the facts about an accident than any other corporation is. That the railroad is engaged in a more dangerous business than any other does not afford it better opportunity to get exclusive possession of the facts about an occurrence. This Court said in the Ballard case "Multiplied citations from the United States Supreme Court could be made, but the thought running through them all, as we understand them, clearly is that the classification is not to be made except upon the basis of *some* difference between the business of those favored and the business of those not favored—the substantial difference warranting the classifications," and this difference which warrants the classification must be one which bears some reasonable relation to the subject in hand.

The Gulf Coast & Sanfrisco R. R. Co. vs. Ellis, 165 U. S. 150, 41 L. Ed. 666, the Supreme Court of the United States had before it a

Texas statute which provided that if a person had a claim against a railroad company for services rendered or for damages or
103 for other charge on freight, or for stock killed or injured, and it was a bona fide claim and he had to sue on it and did sue and succeed, that the railroad company defendant should pay him an attorney's fee of not exceeding $10.00 to be taxed as costs in favor of the plaintiff. The Court held this law to be an unjust discrimination and therefore violative of the fourteenth amendment. The Court said the law did not apply as against all debtors, but only against railroad corporations, that it did not apply to all corporations and then said "but if the classification is not based upon the idea of special privileges, can it be sustained upon the basis of the business in which the corporations are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the Legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And a classification for the imposition of such special duties,—duties arising out of the peculiar business in which they are engaged,—as a just classification, and not one within the prohibition of the fourteenth amendment. Thus, it is frequently required that they fence their tracks and as a penalty for failure to fence, double damages in case of loss are inflicted. Mo. P. R. Co. vs. Humes, 115 U. S. 512 29 L. Ed. 463. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged—a duty not resting upon others; a duty which can be enforced by the Legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the State, or by double damages to the party injured, is immaterial. It is all done in the exercise of the police power of the State and with the view to enforce just and reasonable police regulations."

The Texas statute condemned in the above case had for its purpose the prevention of litigation by making it profitable to railroad companies to pay small claims; and it was also its purpose to make it easier for individuals to contest their claims with railroad corporations.

The statute in the case at bar goes further than this. It not
104 only makes it easier to sue railroads than any other class of persons or corporations, but will have the inevitable result of creating new causes of action and enforcing them against railroad companies when they could not under the same circumstances be enforced against any other person or corporation.

From the foregoing we conclude and insist that to enforce the said statute as now construed will give it the following effect:

1. In every case of injury by a running train the plaintiff can make out his case by proving simply that the injury was so inflicted.

2. In every such case such proof of injury by a running train has this value without regard to the relation *to* the injured person to the company.

3. Although in the absence of this statute, a plaintiff (as tresspasser) could not recover without showing wilful/ness yet with the aid of this statute he can make out his case simply by proving he was injured by a running train. In other words the company's servants under this statute are presumed to have acted wilfully.

4. Although the company may be using its property in a perfectly legal and proper manner, yet, for the purpose of enabling a plaintiff to make out his case the company is presumed to have committed a wrong.

5. Although the plaintiff may himself be the employee who knows the facts about an accident he — with-old his facts and rely upon his presumption.

6. If any wrong has been done the plaintiff may himself be the guilty servant, with-olding the truth and relying upon the presumption.

7. The liability of the company in such cases does — depend upon the result of any injury as whether it has violated any law or breached any duty which it owed the plaintiff, but solely upon the result of the company's efforts to prove the non-liability.

8. Whether a plaintiff shall recover depends not upon whether the company is really liable but whether it is able to prove it is not liable.

9. In every case of pure accident the plaintiff will recover or may re*d*over.

105 10. If it cannot be determined from all of the available information what caused any casualty, the company will be held liable.

11. In all other litigation the burden is upon the plaintiff; the result of this construction puts the burden upon the defendant if the defendant happens to be a railroad corporation.

12. This construction goes further: it will hold a company liable in the absence of wrong doing, thus enforcing liability against railroads where other defendants could not be held.

13. The law discriminates against railroad corporations in that it prescribes a special rule of evidence and a special rule of liability to be used in enforcing claims against such companies.

14. It denies to railroad companies the benefit of laws which are used for the protection of other persons and corporations.

15. If we assume that a classification was made for the purpose of this law, we find no bas*e*s for such classification. (*a*) It is not sufficient to say that the law affects corporations having equal public duties to perform, because there are numerous other corporations having such duties to perform against which the law does not apply. Nor (*b*) that railroads are engaged in a dangerous business because that element in railroading bears no such relation to the subject in hand as will justify the classification. Nor (*c*) that railroad corporations are in possession of the facts about accidents and are therefore prepared to disprove any claim made against them because a railroad company has no better facilities than any other corporation has to inform itself about casualties.

16. Such construction deprives railroad companies of the equal protection of the laws and takes its property without due process of law.

That the court in the opinion in this case conced-s that there may be cases in which persons will recover of railroad companies when they are not entitled to recover under the law, is, it strikes us, sufficient to establish our proposition that this statute will bear upon railroad companies in a discriminating and unequal way and will deprive it of its property without due process of law. Can any law which will authorize persons to recover of railroad companies
106 on unjust and illegal claims be justified on grounds of public policy? Such a law may be best for the public other than railroads, but are not the rights of railroad companies to be also considered in the determination of this question? It would doubtless be best for people in general if they were permitted to recover of railroad corporations under any and all circumstances whenever they might see proper to make a claim, but this would be disastrous to the railroad companies. Must the rights of railroad companies under the law *to* be sacrificed, as they must be sacrificed under this statute as now construed, in order that they may be held liable in every case where an unavoidable accident happens? Is it meant to say that railroad corporations are bound to know how every accident happens and how every injury is inflicted, and that if it does not keep itself informed about such occurrences it must be muleted in damages?

It certainly cannot be said that the interests of the public demand any such law. There has never been any difficulty in this state in getting verdicts against railroad corporations at the hands of juries. Plaintiffs have never had any difficulty in meeting their burdens when they had to prove their cases.

We respectfully submit that this construction of the statute cannot be upheld on grounds of public policy; that it cannot be upheld as a police regulation; that it cannot be upheld as legislation based upon a reasonable classification; and that it is therefore violative of the 14th amendment in that it authorizes the taking of property of railroad corporations without due process of law and denies to such corporation the equal protection of laws.

Respectfully submitted,

MAY, FLOWERS & WHITFIELD,
Att'ys for Appellant.

March Term, 1908, Monday June 8th, 1908.

It is ordered and adjudged by the Court that the suggestion of error filed by the appellant in this cause be and the same is hereby overruled.

107 In the Supreme Court of the State of Mississippi.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY, Plaintiff in Error,

vs.

J. A. TURNIPSEED, Adm'r, et al., Defendants in Error.

Comes now the above named Mobile, Jackson & Kansas City Railroad Company by its attorneys and says:

That on the 20th day of April A. D. 1908 judgement in this case was entered by this court against this petitioner, the Mobile, Jackson & Kansas City Railroad Company, Appellant and thereafter suggestion of Error was filed, presented, considered, and on the 8th Day of June A. D. 1908 denied by this court, whereupon said judgement became final; that said Mobile, Jackson & Kansas City Railroad Company was and is aggrieved in that, in said judgement and the proceedings had prior thereto in this case, certain errors were committed to its prejudice; that this is an action brought against this petitioner under §193 of the Constitution of the State of Mississippi and §3559 of the Annotated Code of Mississippi of 1892 and said section of the Constitution and the said section of the code are involved in this litigation and are depended upon to support the final judgement in this cause; that the said section of the Mississippi Code of 1892 and of the Constitution of the State of Mississippi in 1890 are violative of the fourteenth amendment to the Federal Constitution in that they attempt to authorize the taking of property without the due process of law and deny to railroad corporations the equal protection of the laws; that in the proceedings in the said cause §1985 of the Mississippi Code of 1906 was enforced against this petitioner and said section, as construed and enforced by this court renders it, the said section 1985, also violative of the said fourteenth amendment in that it attempts to authorize the taking of property without due process of law and denies to railroad corporations the equal protection of the law; and the said statutes and the said section of the Constitution were enforced against this petitioner and thereby it was deprived of rights guaranteed to it by the fourteenth
108 amendment to the Federal Constitution, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore said Mobile, Jackson & Kansas City Railroad Company prays that a Writ of Error may issue to the Supreme Court of the State of Mississippi for the correction of the errors complained of and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the United States Supreme Court.

J. N. FLOWERS,
MAY, FLOWERS & WHITFIELD,
Att'ys for M., J. & K. C. R. R. Co.

109 In the Supreme Court of the State of Mississippi.

MOBILE, JACKSON & KANSAS CITY RAILROAD CO., Appellant,
vs.
J. A. TURNIPSEED, Adm'r, et al., Appellees.

Comes now Mobile, Jackson & Kansas City Railroad Company the appellant above named, by its attorneys, on this the 10th. day of July A. D. 1908 and filed and presents to this court its petition praying for the allowance of a writ of error intended to be urged by it; and praying further that a duly authenticated transcript of the record, proceedings and papers upon which the judgement herein was rendered, may be sent to the Supreme Court of the United States; and that other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition this court desiring to give petitioner an opportunity to test in the supreme court of the United States the questions therein presented, it is ordered by this court that a writ of error be allowed, as prayed, provided, however, that said Mobile, Jackson & Kansas City Railroad Company, appellant, give bond according to law in the sum of $1000.00 which said bond shall operate as a supersedeas bond.

In testimony whereof witness our hands this the 11th. day of July, A. D. 1908.

A. H. WHITFIELD,
Chief Justice of the Supreme Court of the State of Miss.

110 In the Supreme Court of the United States.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY, Plaintiffs in Error,
versus
J. A. TURNIPSEED, Administrator, et al., Defendants in Error.

Assignment of Errors.

Comes now the plaintiff in error in the above entitled cause, and avers and shows that in the record and proceedings in said cause, the Supreme Court of the State of Mississippi erred to the grievous injury and wrong of the plaintiff herein, and to the prejudice, and against the rights of the plaintiff in error in the following particulars, to-wit:

1. The court erred in holding that §193 of the Constitution of the State of Mississippi of 1890 which creates causes of action and rules of liability against railroad corporations which do not obtain against other corporations nor against persons and unincorporated companies operating railroads, is not in conflict with the fourteenth amendment to the Constitution of the United States and does not deny to railroad corporations the equal protection of the laws.

2. The court erred in holding that § 3559 of the Annotsed Code of Mississippi of 1892 which was enacted to exclude said section 193

of the Constitution of 1890 does not contravene the fourteenth amendment to the Constitution of the United States and does not deny to railroad corporations the equal protection of the laws.

3. The court erred in holding that Section 1985 of the Mississippi Code of 1906 is not violative of the fourteenth amendment to the Constitution of the United States and that the enforcement of the said section 1985 as construed by the court does not deny to railroad corporations the equal protection of the laws and does not take the property of said corporation without due process of law.

Wherefore, for these and other manifest errors appearing
111 in the record, the said Mobile, Jackson & Kansas City Railroad Company, plaintiff in error, prays that the judgement of the said Supreme Court of Mississippi be reversed and set aside and held for naught, and that judgement be rendered for plaintiff in error granting it its rights under the constitution of the United States, and plaintiff in error also prays judgement for its cost.

J. N. FLOWERS,
MAY, FLOWERS & WHITFIELD,
Att'ys for Plaintiffs in Error.

112 In the Supreme Court of the United States.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY, Plaintiff in Error,

vs.

J. A. TURNIPSEED, Adm'r, et al., Defendant in Error.

Know all men by these presents that we, Mobile, Jackson & Kansas City Railroad Company, a corporation chartered under the laws of the State of Mississippi and Alabama and domiciled at Mobile, in the State of Alabama, principal and the Fidelity and Deposit Company — Maryland of Baltimore Maryland Surety are held and firmly bound unto the above named J. A. Turnipseed Administrator and Nettie Mary Hicks, Austin Leon Hicks, Alice Rea Hicks & Sarah Elizabeth Hicks, in the sum of ($1000.00) one thousand dollars to be paid to them and for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our successors and assigns jointly and severally firmly by these presents.

Witness our signatures the 10th. day of July in the year of our Lord one thousand nine hundred and eight.

Whereas the above named Mobile, Jackson & Kansas City Railroad Company, plaintiff in error, seeks to prosecute its writ of error in the supreme court of the United States to reverse the judgement rendered in the above entitled action by the supreme court of the State of Mississippi.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its writ of error

to effect and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY,
By MAY, FLOWERS & WHITFIELD.

As to surety:

FIDELITY & DEPOSIT CO. OF MARYLAND,
By W. R. HARPER, *Attorney-in-fact.*

Attest:
EDWARD SERGER, *Agent.*

This bond approved this the 10th. day of July, 1908.
A. H. WHITFIELD, *C. J.*

113 UNITED STATES OF AMERICA:

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Mississippi, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Mississippi, before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit, between the Mobile, Jackson & Kansas City Railroad Company, defendant and plaintiff in error and J. A. Turnipseed, Administrator et al., plaintiffs and defendants in error wherein was drawn in question the validity of certain statutes and constitutional provisions of said State, on the ground of their being repugnant to the constitution of the United States and the decision was in favor of such their validity; and wherein was drawn in question the construction of clauses of the constitution of the United States, and the decision was against the rights privileges and exemptions specially set up and claimed under such clauses of the said constitution, a manifest error hath happened, to the great damage of the Mobile, Jackson & Kansas City Railroad Company, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 10th day of August next in the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

114 & 115 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 11 day of July 1908.

[Seal U. S. Circuit Court, Southern District of Mississippi.]

T. B. MOSELEY,
Clerk of the Circuit Court of the United States
for the Southern District of Mississippi.
By B. L. TODD, JR., *D. C.*

Allowed by:

A. H. WHITFIELD,
Chief Justice of the Supreme Court
of the State of Mississippi.

116 IN THE SUPREME COURT OF MISSISSIPPI.
County of Hinds:

I, Geo. C. Myers, Clerk of the Supreme Court of Mississippi, being the Court of said State having the highest, last, and final jurisdiction of all pleas and causes pending in the Courts of said State, do hereby certify that the foregoing are true full and correct copies of the papers, each and all of them, constituting the record in the said Supreme Court of Mississippi, in the case of Mobile Jackson & Kansas City Railroad Company vs. J. A. Turnipseed administrator of the estate of Mary Alice Hicks deceased, including the transcript of the record from the Circuit Court of Newton County, the final judgment of the Supreme Court of Mississippi, the opinion of the Court, suggestion error and order overruling same, petition for writ of error, assignment of errors and bond, the writ of error and citation to the Supreme Court of the United States of America, all of which appears of record on file in said Supreme Court of Mississippi.

Given under my hand and the seal of said Supreme Court, at Jackson, Miss. this the 4th day of August A. D. 1908, and the one hundred and thirty second year of the Independence of the United States of America.

[Seal State of Mississippi. Supreme Court.]

GEO. C. MYERS.
Clerk Supreme Court of Miss.

UNITED STATES OF AMERICA,
Supreme Court of Mississippi, ss:

In obedience to the commands of the within writ of error, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Mississippi, in the City of Jackson, this August 6th A. D. 1908.

[Seal State of Mississippi. Supreme Court.]

[L. S.] GEO. C. MYERS, *Clerk.*

117 Supreme Court, State of Mississippi.

I, Geo. C. Myers Clerk of said Court, do hereby certify that there was lodged with me as such Clerk, in the matter of the Mobile Jackson & Kansas City Railroad Co. v. J. A. Turnipseed administrator of Mary A. Hicks deceased,

1. The original appeal bond of which a copy is herein set forth.
2. A copy of the writ of error as herein set forth.

In testimony whereof, I hereunto set my hand and affix the seal of said Court at my office in Jackson Mississippi, this August 6th A. D. 1908.

[Seal State of Mississippi, Supreme Court.]

GEO. C. MYERS, *Clerk.*

118 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. A. Turnipseed, Administrator of the Estates of Ray Hicks, and Mary Alice Hicks, and Next Friend of Minnie Mary Hicks, Austin Leon Hicks, Alice Rea Hicks, Sarah Elizabeth Hicks, Minors, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Mississippi wherein the Mobile, Jackson & Kansas City Railroad Company is plaintiff in error, and you are defendants in error, to show cause if any there be why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Mississippi, this 1 day of August, A. D. 1908.

A. H. WHITFIELD,
Chief Justice Supreme Court of Miss.

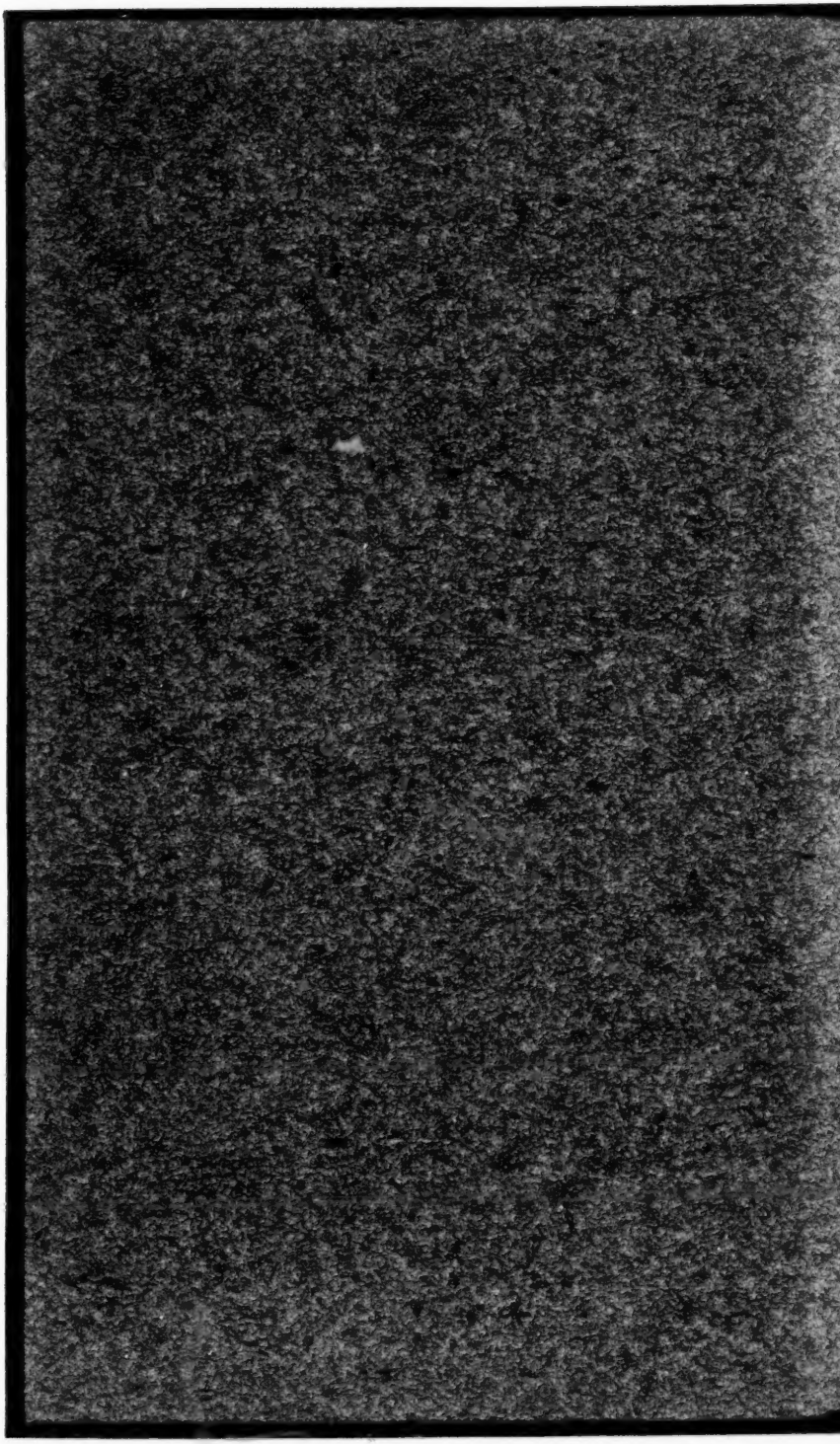
Attest:

____ ____,
Clerk Supreme Court of Mississippi.

We acknowledge service of the above citation this Aug. 6, 1908.

ALEXANDER & ALEXANDER,
Att'ys of Record for Defendants in Error.

Endorsed on cover: File No. 21,310. Mississippi Supreme Court. Term No. 241. Mobile, Jackson & Kansas City Railroad Company, plaintiff in error, vs. J. A. Turnipseed, administrator of the estates of Ray Hicks and Mary Alice Hicks, and next friend of Minnie Mary Hicks, et al. Filed August 20th, 1908. File No. 21,310.



In the Supreme Court of the United States.

October Term, 1910.

NO. 241.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY,
Plaintiff in Error,

v.

J. A. TURNIPSEED, Administrator, Et Al.
Defendants in Error,

BRIEF FOR PLAINTIFF IN ERROR.

Two suits were field in the Circuit Court of Newton county, Mississippi, July 5, 1906, against the Mobile, Jackson & Kansas City Railroad Company, to recover damages for the death of Ray Hicks. One suit was brought by the widow and children of the deceased, the other by the administratrix of his estate, Mary Alice Hicks. The two were, on motion of plaintiffs, consolidated and tried as one case. There was a jury and verdict for plaintiffs for $7,500.00 and on appeal to the supreme court of the state the judgment of the trial court was affirmed. Pending the appeal to the supreme court Mary Alice Hicks died and the suit was revived in the name of J. A. Turnipseed, administrator. It comes to this court on writ of error to the supreme court of Mississippi.

The facts out of which the controversy arose are as follows:

On October 28, 1905, Ray Hicks was in the employment of the said railroad company as section foreman. He had a crew of men under him and was engaged in repairing track. His crew had stopped about the noon hour and were walking along the right of way near the track. The line runs north and south and Hicks and his men were walking northward. A train came along going in the same direction. It was a mixed train having eight box cars, a caboose, and a passenger coach on the end behind. When the train was passing the point where Hicks was standing, one of the box cars left the track carrying four others with it. Hicks was on the east side of the track

and two of the cars came on that side and three went on the west side. The first car left the rails at a point about 280 feet from Hicks. The last car that left the track ran along on the cross-ties till it reached a point about opposite Hicks when it turned over and fell on him. He died about three days later from the injuries so received. The accident happened at a point not near any station. There was no defect in the track which could be discovered, although examinations were made to find the cause of the derailment. There were no defects in the machinery which could be found.

There were numerous grounds of liability claimed in the two declarations,—the two being treated as one after the consolidation. But the case was tried on one only of the grounds claimed, namely, that the engineer in charge of the train was running it at a reckless rate of speed. This is the only charge of negligence attempted to be proved. The passengers gave their opinion as to the speed, estimating it at from 20 to 40 miles per hour. It was a new road, unballasted, but the track at this place was good, and the only witness who undertook to say how fast a train might safely run over this track said that it was safe for 35 miles per hour. The train was running, according to the passenger witnesses, much faster than the schedule for the entire line allowed. It is not known what caused the derailment. But all the facts about the derailment as far as they could be ascertained were shown.

The plaintiffs insisted that they were entitled to recover for the negligence of the engineer. And the supreme court so held. They depend upon section 193 of Mississippi constitution of 1890 and section 3559 of the Annotated Code of 1892. The said section of the code is as follows:

"3559. Fellow-servant rule.—Every employe of a railroad corporation shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its employes, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow-

servant on another train of cars, or one engaged about a different piece of work. Knowledge by an employe injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall not be a defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. Where death ensues from an injury to an employe, the legal or personal representative of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, express or implied, made by an employe to waive the benefit of this section shall be null and void; and this section shall not deprive an employe of a corporation or his legal or personal representative of any right or remedy that he now has by law."

The plaintiff also invoked section 1985 of the Mississippi Code of 1906, which is as follows:

"1985 (1808). Injury to persons or property by railroads prima facie evidence of want of skill, etc.—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employes of railroad companies."

The case is reported in 91 Miss., p. 273.

I.

It is our contention that section 3559 of Annotated Code of 1892, copied in full above herein, as construed by the supreme court of Mississippi in this case violates the 14th amendment of the federal constitution in that it denies to railroad corporations the equal protection of the laws.

We wish to be understood as maintaining the constitutionality of the said provisions as they had been construed by our court previously in the cases of **Ballard v. Cotton Oil Co.,** 81 Miss., 507, and **Bradford Construction Co. v. Heflin,** 88 Miss., 362. In those cases the court carefully kept its hold upon the

principle which justifies legislation of this character. That statutes may be made to abolish the fellow-servant rule in part as to employes of railroad companies and leave it in full operation as far as it affects the rights of servants of other masters we concede. This is what the Mississippi court said in the cases just mentioned and it is what this court has seemed to say in the cases of **Minneapolis etc. Ry. Co. v. Herrick,** 127 U. S., 210; **Tullis v. Lake Erie etc. R. Co.,** 175 U. S., 348; **Missouri Pac. Ry. Co. v. Mackey,** 127 U. S., 205; **Gulf, C. & S. F. R. Co. v. Ellis,** 165 U. S., 150, and other cases. Railroad companies do a dangerous business. Nothing perhaps is dangerous on so large a scale as the operation of railroad trains. Special legislation touching the liability of persons whose bodies and lives are put in jeopardy by the perils of railroad train operation is both allowable and wise. The element in the operation of trains which puts railroad companies in a class to themselves for the purposes of special legislation is this inherent dangerousness. As stated above our court has recognized the principle in former decisions.

In **Ballard v. Mississippi Cotton Oil Company,** 81 Miss., 533, 34 South. 532, 62 L. R. A. 407, 95 Am. St. Rep., 476, our court said that the characteristic of the railroad business which warrants the legislature in abolishing the fellow-servant rule in certain respects, is the necessary peril attendant upon the operation of railroad trains. So many persons are engaged in the operation of railroad trains. The work is necessarily dangerous under the most favorable conditions. Employes are so placed as to be at the mercy of other employes. They are frequently injured through the negligence of persons whom they cannot watch. The hazardous nature of this work which railroad employes have to perform is held by our court, following this court, to furnish a basis for classification for the purpose of passing special laws to protect persons whose safety is imperilled by this inherent peculiarity of the work. The legislature recognizes these characteristics. Persons employed in the operation of trains on railroads were thought to need more protection from the law against the negligence of fellow-servants than persons engaged in any other business. The courts have examined this special legislation, and have determined that the difference between the operation of railroads and the carrying on of other kinds of business is such as to warrant the classification made.

And in **Bradford Construction Company v. Heflin,** 88 Miss., 314, 42 South, 174, 12 L. R. A. (N. S.) 1040, the court held that since railroad companies have been put into a class to themselves for the purpose of this special legislation because the business in which they are engaged is peculiarly hazardous, the reason for the classification must be constantly kept in mind; that employes cannot claim the benefit of this special legislation simply because they are employed by railroad companies; that where the reason fails the classification must fail; that the employes sought to be helped are such only as are in need of help; that no employe can claim the benefit of the special enactment whose safety is not imperilled by the hazards peculiar to railroading. And the court went further in this last case and said that the employes of corporations operating dummy lines, or construction roads, or logging roads are not entitled to the protection. The business of such companies may be as hazardous, but it is not so large. The evils are not so general and do not demand special legislation for the protection of persons exposed to them. So it appears that the courts uphold this special legislation with respect only to employes engaged in the hazardous part of railroading, and in the hazardous part of such railroading only as is general and extensive. Only the employes of the great common carriers owned by railroad corporations can claim the benefit of section 1985. And the court said further in that case (page 362, of 88 Miss.):

> "It manifestly never was the purpose of the constitution makers in said section 193 to give to all employes of railroad corporations the remedies therein provided. They meant such employes as were imperilled by the hazardous nature of the business of operating railroad trains. The very ground upon which the United States supreme court all along held that such legislation was constitutional was that the nature of the business of operating railroad cars is inherently dangerous. It would be absurd to hold that there was any inherent danger in discharging the duties of ticket agent, or telegraph dispatcher, or many other offices in which employes of railroads are at work. It would be equally absurd to hold that employes of a railroad corporation engaged in the construction of a roundhouse, or any other work not at all connected with the operation of cars,

were engaged in work inherently dangerous. They would be in no more danger than any like employe of any other master. In short, the reason which sustains said section 193 of the constitution being the inherent danger attending the actual operation of railroad trains, the remedy must be limited to those employes whom such danger imperils."

A trackman is in no more danger from the operation of trains than is a telegraph operator. Both usually work along the track, and are near the track when the trains pass. The telegraph operator frequently has his office up within a few feet of the passing train. If the train should be derailed when passing his office, and should run into his office and injure him, could such operator recover under section 193? Is there anything "inherently dangerous" in track work? If any trackman is imperilled by a running train, is it not from his own selection of his position? Is there any duty which any trackman has to perform which fastens him to the track, or makes him depend upon the safe and careful operation of running trains? There is no more danger in building a track for a railroad corporation than in building a bridge for a county. There is no more danger in repairing a track than there is in building a roundhouse. The mere fact that this one man was injured by a running train which was derailed does not establish a dangerous character as attaching to his employment. It certainly is not as dangerous to repair a track, and stand near the track when trains pass, as to fell trees in the woods, or to work around a saw mill or to build houses. There is nothing "inherently dangerous" in it.

The statute cannot be consistently applied to the case of employes, except those who take part in the actual operation of trains, or whose duties expose them to dangers from the actual operation of trains. The dangerous part of the railroad business, which justifies the classification of it as a dangerous business, is the running of trains. The statute only applies to those who take part in such dangerous business, or whose duties expose them to such dangers. Those who are on the trains being operated are certainly within the statute. Those whose duties place them upon the track and make their safety depend upon the safe handling of trains are also within its provisions. If trackmen are within the statute then bridge gangs are, and then

persons building depots along the track must necessarily be, and other employes, whose offices are near the track, must also come within its provisions. Trains do not usually jump the track. This does not occur so often as to make an employment dangerous, because it is to be carried on near the track and subjects those engaged in it to danger from derailed trains. The danger of railroading does not arise out of the possibility or frequency of derailments. It is possible that this court never had to deal with a case of an injury to one standing near the track, caused by a derailed train.

Conductors, engineers, brakemen, flagmen and firemen are all clearly within the rule, and are entitled to the benefits of the said section. Their duties require them to be on and about running trains and to assist in their operation. If anything happens to the train, they must suffer. Their business is "inherently dangerous." Their safety depends upon the safe moving of the trains on the tracks. Switchmen, hostlers, and others whose duties do not require them to be on running trains, but who are bound in the performance of their duties to be on or close to the track, are also clearly within the protection of the said section. These persons can no doubt recover for the negligence of other persons in every department of labor and about another piece of work, although some other employes or officers themselves are not engaged in any employment that is "inherently dangerous."

To determine whether the person injured is entitled to the protection of section 193 of the constitution, we should not look at the character of the employment of the person whose negligence caused the injury, but to the character of the employment of the person who was himself injured. A train dispatcher, in his office, some distance away from the track, is clearly not within the provisions of said section, as our court has said even before a case arose which made it necessary for the court to say it. The court said, also, that a ticket agent or telegraph dispatcher is clearly not within the provisions of the said section and that persons engaged in the construction of a roundhouse are not within the provisions of the said section. But, while these persons are not within the provisions of the said section themselves, their negligence may cause injuries

to persons who are within the protection of the constitutional provisions. They could not recover for negligence of the persons who are exposed to the dangers of railroading; but such persons who are exposed can recover for their negligence under our constitution.

In the case at bar Hicks was engaged in no dangerous business. His injuries did result from a running train, the said train having been derailed and turned over on him. If there was any negligence causing the injury it was the negligence of the engineer; and this engineer was himself in a dangerous employment; but, if the person injured was not himself engaged in work "inherently dangerous," he cannot recover under section 193, on the ground that the person whose negligence caused his injury was engaged about a dangerous business. The statute was made for the protection of those whose duties subject them to the dangers of railroading. If the engineer had been injured on account of the negligence of the trackmen, this section would apply. The engineer is engaged in a dangerous employment, and the trackmen in a safe employment. The trackman is not exposed to the dangers of railroading, but his negligence may support an action in behalf of a fellow servant who is engaged in any dangerous railroad business. The person or servant whose negligence causes the injury to his fellow-servant may be at a safe distance from danger. His negligence, however, avails his fellow servant who is exposed to dangers and who is injured thereby. The person guilty of the negligence may be in a dangerous employment himself. The person who is injured must have been engaged in work which exposed him to the hazards of railroading.

Our complaint is not that the Mississippi court has failed to state the principle correctly but that it has refused to recognize it in the case at bar. It has said that the statutory fellow servant rule was made not for the benefit of all railroad employes, but of those employes only who are engaged in the hazardous part of railroading. To state the principle is futile if the court when it comes to the classification of plaintiff-employes, may place all of them under the protection of the rule. This is adopting sound rules in the abstract but disregarding them in the concrete case. The court cannot say in stating the prin-

ciple that the statute can only be invoked by an employe whose duties expose him to the dangers peculiar to railroad work and then declare that a person who is engaged in no such dangerous work is protected by the rule by simply holding his non-dangerous employment to be in fact perilous. This is affirming a rule in one breath and abrogating it in the next. This is advertising an abstract recognition of a principle which has been approved by the Federal supreme court and then making such practical use of it as to nullify it. A state court cannot affirm a correct principle and thereby avoid or prevent a review by this court of the decision in which the principle is employed, the purpose of such review being to determine whether the case in hand has been tried by the conceded rule. Certainly if the Mississippi court while still avowing its allegiance to the principle that only railroad employes engaged in hazardous work may have the benefit of this special legislation should then further declare that telegraph operators, carpenters, clerks and agents are all entitled to this same protection this court would look through the formal announcement of the principle and inquire as to its application and use. The state court could not shut off inquiry by a finding that the agent, clerk, telegraph operator or carpenter was engaged about a dangerous work. This would be a finding against the fact. We insist that the Mississippi court has in the case at bar extended the statutory rule so as to protect an employe who was engaged in no dangerous work; that it avows its recognition of the proper test but in the practical use of the test nullifies it. To give the benefit of the section to a trackman is to let in all employes regardless of the character of their duties as being safe or hazardous. If a track repairer is engaged in dangerous work calling for special protective legislation, then, also, are the station agent, the telegraph operator, the carpenter and the clerk. But this would open the door so as to let in all who are in the employ of a railroad company. The state court says the employe claiming the protection must have been so engaged as to be exposed to the dangers peculiar to railroading but then decides that a trackman is so engaged. The court's own interpretation of its statement of the principle robs the rule of the meaning which makes it law.

The Mississippi court again formally recognizes a correct

abstract rule and then nullifies it in the application. On page 357 of 91 Miss., the court says:

> "It is very true x x x that it is not instances which are to be classified but employments."

On page 356, however, it is said that the best answer to the contention that Hicks did not belong to the protected class is that he was actually killed by a running train.

> "It is useless to say that Hicks was exposed to no such peril in the light of the fact that it was just such a peril which resulted in inflicting upon him death. He was killed by the running of the train."

Here the court concedes that the statute must be so construed as to embrace those employes only whose duties expose them to the peculiar dangers of railroading. And at the same time, in the application of the principle the court says it is sufficient that we find Hicks to have been killed by a running train. It makes no difference how safe the employment, the protection extends to all who suffer from perils peculiar to railroad operation. It matters not under this view, whether the perils are incident to the employment or not, the sole inquiry being whether the injury resulted to an employe from one of the dangers of the operation of railroad trains. It was declared in the abstract that employments and not instances must be classified, but in this case the court proceeded to classify instances and not employments. If any rule could be framed to cover this part of the decision it would be "all employes are entitled to the protection provided their injuries result from one of the perils of railroad operation." This rule only requires a plaintiff to show (1) that he was an employe and (2) that he was injured by a running train. There is no necessity to consider the character of duties, nor whether he is constantly or generally exposed to dangers, nor whether he was likely to suffer from such perils. His employment might be considered ordinarily safe. The injury might be the result of the merest accident. No such accident may ever have happened before. But if in this single instance he suffered from a casualty resulting from the operation of a train he has the protection.

The deceased was not even engaged about the duties of his employment at the time he was hurt but had stopped at the

noon hour and was walking along the track. He was an employe, however; he was hurt by a running train; from these the conclusion is reached that he was one who was entitled to the protection. His duties did not require him to be where he was. It was a place of his own selection. If his position was a dangerous one he voluntarily assumed it. He may get away from the track to let trains pass if he desires. He cannot be said to be engaged in a dangerous employment just because he works on the track and trains run along the track and might jump the track and fall on him if he stood too near when trains were passing.

In the concluding paragraph of the opinion in **Ry. Co. v. Mackey, supra,** this court said:

> "But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities."

This was quoted with approval in **Tullis v. R. R. Company,** p. 351, of 175 U. S.

If the inherent danger attendant upon the operation of railroad trains is that which justifies the legislation based upon a classification placing railroad corporations to themselves, the statute can be good only so far as the reason for the classification extends. To hold that the statutory protection does not avail persons engaged in railroad service which is not dangerous is to keep a hold upon the reason underlying the statute itself. The special class legislation is to be invoked against the railroad corporation at those points only where its business is inherently different from the business of other corporations.

The Minnesota Supreme Court in **Blomquist v. Great Northern Railroad Co.,** 65 Minn., 69, said that the statute of that state, similar to the Mississippi statute would be construed as protecting those employes only "who are exposed to the peculiar danger attending the operation of railroads, or what are, for brevity, called 'railroad dangers.'" It was even held in that

case, however, that a trackman injured by dropping a crosstie which he was hurriedly carrying to repair a track before a train arrived was entitled to the protection. That case was decided in 1896, several years after the statute was upheld by this court in **Railway Co. v. Mackey, supra,** which was decided in 1887. In other words this court has not approved this act with the construction subsequently given it by the state court. Besides, the Minnesota court has said that the Blomquist case was at the time considered a close or "border" case and was permitted to pass because of the charge that the plaintiff had to do the work in great haste in order to avoid danger to trains that were or might be approaching. **Jemming v. Great Northern R. R. Co.,** Minn. 1 L. R. A. (N. S.), 702. In that case the court also refers to **Anderson v. Railroad Company,** 74 Minn., 432, wherein the Blomquist case was followed and the issue was submitted to the jury whether the plaintiff was using a jack under circumstances rendered peculiarly dangerous because of the haste in which the work had to be done in order to complete it before a train should arrive. It is more dangerous to use a jack on a railroad than elsewhere because one has to be in greater haste. The danger is so peculiar and large as to call for special legislation. In the Jemming case the supreme court of Minnesota rather apologizes for the decision in the Blomquist case. It is mentioned but not re-approved. Jemming was working in a gravel pit. Gravel was being loaded on cars which were standing on a spur track. He was injured by the dipper which was let down into the pit by a crane. The negligence was in the conduct of the man operating the crane. The court held that Jemming was not engaged in any such work as entitled him to protection under the statute. The Minnesota court applies the test for which we are here contending. The work in which the injured employe is engaged must be dangerous and the danger must be one peculiar to railroading. Certainly the contention is not sound that one who works near a railroad, within a few feet of passing trains, is engaged in dangerous work because a train might at that point jump the track and fall on him. Hicks was doing no work at all when he was killed. It was not a danger connected with his work from which he suffeerd. If his work could be considered dangerous because it has to be done rapidly the fact is of no consequence in this consideration as

he was not doing work and incurring the danger when he was hurt. A station agent meeting a train to receive or deliver billing; a clerk who stands in the doorway of his office to watch the train pass; a telegraph operator who sits at his tickers in the bay-window close to the track; the porter who loads and unloads baggage; the railroad mail carrier who reeeives and delivers mail sacks; the track-walker who goes over the line to see that all is well; the watchman or towerman at crossings of public thoroughfares; the bridge carpenter who gets off the bridge he is repairing and stands by the track for trains to pass; the light keeper who places the lights every evening at switches: each and all of these employes are protected if the trackman is in the protected class and certainly if the section foreman in the case at bar is in that class.

In fact, every employe whose duties take him near the tracks is to claim the protection, the peculiar danger to which he is exposed being from derailed trains. Do trains so frequently leave the track and fall on people as that it may be said there is great danger from this quarter?

The weakness in this case is in the fact that Hicks was not hurt by one of the recognized dangers of railroad work. The danger was not inherent in his work if it was a danger at all. He was not hurt because of the character of his work, unless it could be said that if he had not been a section foreman he would not have been out on the line and would therefore have had no occasion to be walking along the right of way near enough to the track to be caught by a derailed train. If his work was dangerous because it compelled him to remain on or near the track he still exposed himself to the danger when he was not at work and there was no necessity for him to be on or near the track.

In **Railroad v. Pontius,** 157 U. S., 200, 39 L. Ed., 675, this court affirmed a judgment rendered under a Kansas statute in favor of a bridge carpenter who was assisting in the dangerous work of loading timbers on a car. The timbers were being taken from under a bridge and the car seems to have been standing on the bridge. It appears to have been conceded in the case that if the bridge carpenter had been engaged about the duties for which he was employed he would not have been en-

titled to the protection. He was engaged in other and dangerous work at the time of his injury. The railroad company insisted that Pontius was only a bridge carpenter and could not recover. This court said:

> "But the difficulty with this argument is that the state supreme court found upon the facts that, although the plaintiff's general employment was that of a bridge carpenter, he was engaged at the time the accident occurred, not in building a bridge but in loading timber on a car for transportation over the line of defendant's road."

But this court has never had before it a case in which the question now presented was involved. There has been before it no case in which a state court declared work to be dangerous which was not in fact dangerous.

The Iowa court has held more than once that a trackman is exposed to the perils incident to railroading. **Dunn v. Railroad Company,** 130 Pa., 580, 107 N. W. 616, 6 L. R. A. (N. S.) 452.

The Missouri court held that one assisting in repairing track who was hurt while actually engaged in the performance of his duties through the negligence of a fellow servant could recover. **Callahan v. Railroad Company,** 170 Mo., 473, 71 S. W. 208, 94 Am. St. Rep., 746. And on writ of error to this court the judgment of the Missouri court was affirmed without an opinion. 194 U. S. 826, 49 L. Ed. 1157.

But these cases do not go as far as the Mississippi court court has gone in the instant case. Here we have a man who was not at work at all; whose duties did not call for any work except supervision; who at the time of the injury, was not even engaged in the work of directing his men but had stopped for dinner. See declarations, pp. 3 and 5 of record. He happened to be near the track when the train passed. He was not a laborer—a section hand—but a "section boss," who is the foreman of a "gang". His duties are well known to courts and juries. He is not tied to the track by his work; he is under the immediate direction of no one. He can stand as near or as far from a passing train as he desires.

The supreme court of Mississippi refused to consider the nature of his employment but found it sufficient that he was

injured by a running train, by one of the dangers of railroad operation. He was an employe; he was hurt by a running train. These two facts render further consideration of the applicability of the statute unnecessary in the opinion of the court.

This construction of the statute loses sight of the basis of the classification. It extends the statute to persons who are not exposed to the dangers incident to the business; to persons who do not incur the risks to which employes of many other masters are exposed. It makes the statute protect all railroad employes whatever may be their duties and whatever they may be doing at the time.

II.

In the effort to make it easy to fasten liability upon railroad companies our legislature has gone to the extreme. Not only has the fellow servant rule been abolished for the benefit of certain employes and this rule pushed as far as the Federal constitution will permit, and further as we contend, but our legislature has enacted another statute whose effect is to make it almost impossible for a railroad corporation to escape liability for any damage resulting from the operation of the road. The effect of this statute is to make railroad corporations liable in every instance of damage to persons or property unless it is able to meet successfully the burden of proving its innocence. This statute is section 1985 of the Mississippi Code of 1906 and is as follows:

> "Injury to Persons or Property by railroads prima facie evidence of want of skill, etc.—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employes of railroad companies."

There can be no difference of opinion as to whether this statute prescribes a rule of liability on the part of railroad corporations, to passengers, to employes, to strangers and to property which does not obtain as against other defendants. An exception is made of railroad companies. The burden of proof is

shifted to the defendant. In cases against other defendants the burden is upon the plaintiff to show not only that the defendant caused the injury complained of but that it wrongfully caused it. Under this statute the plaintiff is required to show only that the defendant's locomotive or train caused the injury. The burden then rests upon the defendant to establish its innocence; to disprove guilt. And it must make such proof at its peril. If it does not know how the casualty happened it must pay the penalty. However innocent it may be; however ignorant it may be, it must pay the damages. If there should happen to be an unavoidable accident and no employe and no agent or servant omitted any precaution known to expert railroad operatives still the company must pay damages for not knowing the unknowable.

The law puts railroad corporations in a class to themselves. It is legislation directed specially against railroads. There is no reason in the classification. It is arbitrary. The inherent difference between railroad operation and other enterprises is the greater danger attendant upon the former. But this difference furnishes no reason for special legislation making it easier to establish claims against them and making them liable in cases where they are not in fact liable under the laws of the land. That its business is dangerous does not mean that the corporation is guilty of wrong in operating it nor that the corporation can more easily inform itself of the facts of every occurrence. It is no more difficult to prove how an injury was inflicted when the defendant is a railroad corporation than when it is a manufacturing corporation. In fact, it is usually not so difficult because manufacturing enterprises are carried on behind closed doors or notices that "no spectators are allowed," while railroads are operated in the open where spectators may gather at will.

It is no answer to this to say that the railroad runs through long stretches of country where no one is present but the employes in charge of trains or tracks. In the first place all enterprises are usually carried on in the absence of the owner. Their employes are always present. The master is never present. And in the second place this statute as recently amended **is actually extended to the employes themselves—the persons most**

often injured and most frequently causing the injury. If the reason for the rule is that the defendant is usually in possession of the facts the reason must fail when the rule is extended to employes since the defendant gets its information through its employes, if it gets it at all. An employe sues. He proves injury by a running train and rests his case. He was helping to run the train. The facts about the occurrence are in the possession of the plaintiff. The defendant must pay damages because it fails to produce the information which is in the possession of the plaintiff.

This statute makes it easier to recover against railroad defendants than against any other defendants. It is a burden put upon them which is put upon no other class of litigants. It means that they must keep themselves informed of every accident and be able to satisfactorily explain how it happened. It is not sufficient that they be able to show the utmost care and diligence at every point. They must go further and explain how the accident happened and that the proximate cause of it was something over which they had no control. It is not sufficient for the defendant to show it has done nothing wrong. It must explain the accident. There is a presumption so the Mississippi court said in this case of absolute **liability.** This presumption must be met. If it has not the facts with which to meet it the penalty for the ignorance must be paid.

The statute here in question takes the employes so favored along with all other persons who may have causes of action against railroad companies to recover damages to persons or property occasioned by running trains and makes it easier for such persons to establish a claim against such corporations than it is to establish a claim against any other defendant. What difference is there between railroad companies and persons and corporations engaged in other businesses which justifies this classification? Railroading is dangerous. The element of danger peculiar to it is held to be such a difference between it and other enterprises as to warrant the enforcement of a certain rule of liability in favor of employes whose situation exposes them to these peculiar dangers, which cannot be used by other employes of railroads, nor by the employes of other persons and corporations. But in the classification for the enactment

of the fellow servant laws the element of danger may properly and reasonably be regarded as a difference which calls for different rules of liability. A railroad employe on one train of cars is dependent for his safety upon the care of employes of the same master on another train of cars or about another piece of work or in a different department of labor. Since his position is so perilous it is proper that he should be protected by rules of law which do not protect employes of other corporations or persons engaged in other businesses. But how can this element of danger in railroading justify a special rule of law or of evidence which makes it easier to prove a case against a railroad than a case against any one else? The dangerousness of the business does not make it more difficult to prove how one was hurt. It is no more difficult to prove how an injury happened when it was inflicted by a railroad train than it is to prove how it happened when occasioned by any other piece of machinery.

In other words the inherent danger of railroading is not a matter to be taken into consideration in the enactment of rules of evidence or of law pertaining to the enforcement of rights of action for injuries inflicted by running trains. The "difference" between railroad companies and other persons and corporations in this regard does not bear a reasonable and just relation to the subject in respect of which the classification is proposed, and therefore such classification is arbitrary.

In **Atchinson T. & S. F. R. R. Co. v. Matthews,** 174 U. S., 96, 43 L. Ed., 909, this court considered a Kansas statute of 1885 which was as follows:

> "Sec. 1. Be it enacted by the legislature of the state of Kansas; That in all actional against any railway company organized or doing business in this state, for damages by fire, caused by the operating of said railroad, it shall be only necessary for the plaintiff in said action to establish the fact that said fire complained of was caused by the operating of said railroad, and the amount of his damages (which proof shall be prima facie evidence of negligence on the part of said railroad); provided, that in estimating the damages under this act, the contributory negligence of the plaintiff shall be taken into consideration.

"Sec. 2. In all actions commenced under this act, if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment. Sess. Laws 1885, chapters 155, 25."

This statute was upheld by a bare majority of this court four justices dissenting. The Mississippi statute is certainly open to more serious criticism than the Kansas act discussed in that case. The Kansas court had held the act was intended as a police regulation to prevent fires; that there was great and peculiar danger from fires in that state because of the prairies covered with grass; that for the protection of the property for miles from a railroad it was necessary that stringent measures be enforced to prevent the starting of fires. See p. 101, of 174 U. S. It was proper to adopt special regulations affecting railroads only since there was no other person or corporation running machinery through the country from which fire continually escapes. That statute was recognized as being on the border line. Five members of the bench upheld it, four condemned it.

Again the Kansas act only made proof of the setting out of a fire by a running train **prima facie evidence of negligence on the part of the railroad.** But the Mississippi court construes our statute to mean that proof of injury by a running train is prima facie evidence not of **negligence** but of absolute **liability.** Under our law as now, in this case, for the first time construed, it is not sufficient for the defendant to show that it has been guilty of no negligence. It must go further and account for the accident. It may furnish all the information available still it must be mulcted in damages unless it explains the occurrence. This is the only way in can exonerate itself.

Police regulations to prevent fires are easy to uphold. They may be based upon **sic utere tuo ut alienum non laedas.** The property of others injured by fires is not on but near the track. It does not come in contact with moving trains. It cannot escape by any efforts of its owner. Its safety depends upon the equipment for the prevention of the escape of fire used by the railroad company.

But the damage done to persons and property other than by setting out fires results from contact with moving machinery.

The objects must get on the right of way before they can be reached. Trains do not chase people off the right of way. They have no way to reach persons or property not on the right of way except with fire.

This is no penalty put upon railroad corporations for failure to obey police regulations, such as are discussed and upheld by this court in **Mo. P. R. Co. v. Humes,** 115 U. S., 512, 29 L. Ed., 463. Nor is it a regulation to be treated as a kind of amendment to the charters of railroad corporations such as was considered in **Railroad Co. v. Paul,** 173 U. S., 404, 43 L. Ed., 746. The supreme court of Mississippi has never taken the position that laws affecting the rights and liabilities of railroad companies may be justified as amendments of charters. **Ballard v. Oil Company,** and **Bradford Construction Company v. Heflin, supra.**

The case in this court which is perhaps the best authority for our contention that the said section 1985 of the Mississippi Code of 1906 is arbitrary class legislation is **G. C. & S. F. Ry. Co. v. Ellis,** 165 U. S., 150, 41 L. Ed., 666, where this court had before it a Texas statute providing that if a person had a claim not exceeding $50.00 against any railway company for "personal services rendered or labor done, or for damages, or for overcharge on freight, or claims for stock killed or injured," and should present the claim to an agent of the company and it was not paid within 30 days after such presentation and he was compelled to sue on it and should recover, an attorney's fee of not exceeding $10.00 might also be recovered. The courts of Texas upheld the statue. This court condemned it. The act was passed to enable persons having claims against railroad companies to collect them more readily. And that is the purpose of the Mississippi statute. The Texas statute put a penalty upon railroad companies for contesting and losing small cases; the Mississippi statute puts a penalty on them for not keeping themselves fully informed as to how every accident happened, and for not producing evidence in exoneration. The purpose of each statute was and is to make it easier to collect claims against railroad companies by forcing them to litigate under handicaps which are not imposed upon other defendants.

The Mississippi statute not only makes it easier to sue railroads than any other class of persons or corporations but will

have the inevitable result of creating new causes of action and enforcing them against railroad companies when they could not under the same circumstances be enforced against any other person or corporation.

From the foregoing we conclude and insist that to enforce the said statute as now construed will give it the following effect:

1. In every case of injury by a running train the plaintiff can make out his case by proving simply that the injury was so inflicted.

2. In every such case such proof of injury by a running train has this value without regard to the relation of the injured person to the company.

3. Although in the absence of this statute, a plaintiff (as a trespasser) could not recover without showing wilfulness yet with the aid of this statute he can make out his case simply by proving he was injured by a running train. In other words, the company's servants under this statute are presumed to have acted wilfully.

4. Although the company may be using its property in a perfectly legal and proper manner, yet, for the purpose of enabling a plaintiff to make out his case the company is presumed to have committed a wrong.

5. Although the plaintiff may himself be the employe who knows the facts about an accident he can withhold his facts and rely upon his presumption.

6. If any wrong has been done the plaintiff may himself be the guilty servant withholding the truth and relying upon the presumption.

7. The liability of the company in such cases does not depend upon the result of any inquiry as to whether it has violated any law or breached any duty which it owed the plaintiff, but solely upon the result of the company's efforts to prove its non-liability.

8. Whether a plaintiff shall recover depends not upon whether the company is really liable but whether it is able to prove it is not liable.

9. In every case of pure accident the plaintiff will recover or may recover.

10. If it cannot be determined from all of the available information what caused any casualty the company will be held liable.

11. In all other litigation the burden is upon the plaintiff, but the result of this construction puts the burden upon the defendant if the defendant happens to be a railroad corporation.

12. This construction goes further: it will hold a company liable in the absence of wrong doing, thus enforcing liability against railroads where other defendants could not be held.

13. The law discriminates against railroad corporations in that it prescribes a special rule of evidence and a special rule of liability to be used in enforcing claims against such companies.

14. It denies to railroad companies the benefit of laws which are used for the protection of other persons and corporations.

15. If we assume that a classification was made for the purpose of this law, we find no basis for such classification. (a) It is not sufficient to say that the law affects corporations having equal public duties to perform, because there are numerous other corporations having such duties to perform against which the law does not apply. Nor (b) that railroads are engaged in a dangerous business because that element in railroading bears no such relation to the subject in hand as will justify the classification. Nor (c) that railroad corporations are in possession of the facts about accidents and are therefore prepared to disprove any claim made against them because a railroad company has no better facilities than any other corporation has to inform itself about casualties.

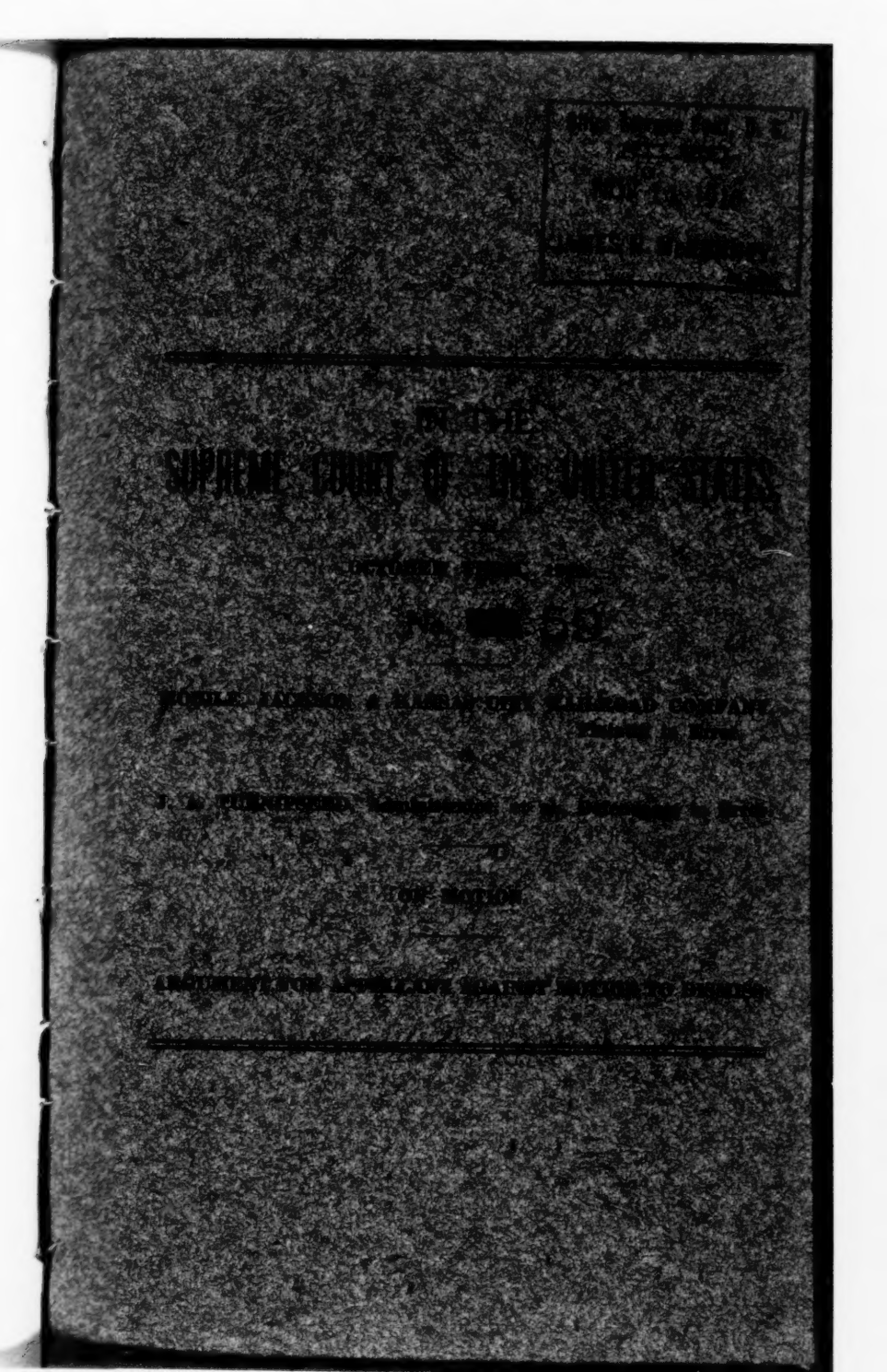
16. Such construction deprives railroad companies of the equal protection of the laws and takes its property without due process of law.

That the Mississippi court in the opinion in this case concedes that there may be cases in which persons will recover of railroad companies when they are not entitled to recover

under the law, is, it strikes us, sufficient to establish our proposition that this statute will bear upon railroad companies in a discriminating and unequal way and will deprive it of its property without due process of law. Can any law which will authorize persons to recover of railroad companies on unjust and illegal claims be justified on grounds of public policy? Such a law may be best for the public other than railroads, but are not the rights of railroad companies to be also considered in the determination of this question?

It would doubtless be best for people in general if they were permitted to recover of railroad corporations under any and all circumstances whenever they might see proper to make a claim, but this would be disastrous to the railroad companies. Must the rights of such corporations under the law be sacrificed as they must be sacrificed under this statute as now construed, in order that they may be held liable in every case where an unavoidable or unaccountable accident happens?

James N. Flowers,
Counsel for Plaintiff in Error.



IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1910.

NO. 241.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY,
Plaintiff in Error,

vs.

J. A. TURNIPSEED, Administrator, et al., Defendants in Error.

ON MOTION.

ARGUMENT FOR APPELLANT AGAINST MOTION TO DISMISS.

The first ground of the motion to dismiss is that the question as to the constitutionality of section 3559 of Annotated Code of Mississippi of 1892, and section 193 of the constitution of Mississippi of 1890 is not involved on this appeal because the opinion of the state supreme court declares "There is really no question of the construction of section 193 of the state constitution involved, but a mere question arising under the ordinary general laws of negligence."

The argument in support of this ground assumes that a state court may write out of any case the federal question and thus prevent a review of its decision by this court; that this court is bound by any declaration on the part of the state court to the effect that no federal question is involved. We do not understand this to be a rule followed by this court. On the other hand this court will examine the record for itself to see whether any such question as raised here is really involved. We recognize the general rule that although a federal question may be raised and pressed in the state courts, yet if the decision of the highest court in the state is based upon a non-federal ground there is no right of review in this court. But this rule

is necessarily confined in its operation by the practice of this court of examining the record and deciding for itself whether a federal question was essentially involved and whether the decision of the state court on an alleged non-federal ground did not deny or ignore a right given by the federal laws. In other words the mere declaration by a state court that its decision is based upon a non-federal ground is not final. If this were not the practice state courts would have it within their power to determine the extent of the jurisdiction of this court. The general rule is stated in

C. B. & Q. Ry. v. Drainage Co., 200 U. S., 561, 580, 50 L. Ed., 596.

> "Undoubtedly, the general rule is that where the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the state court to pass on the federal right or immunity specially set up, of record, is not conclusive, but this court will decide the federal question if the necessary effect of the judgment is to deny a federal right or immunity specially set up or claimed, and which if recognized and enforced would require a judgment different from one resting upon some ground of local or general law."

It is suggested by counsel for the motion that the supreme court of the state of Mississippi eliminated the federal question by resting the decision upon two different non-federal questions. One of these is that the verdict of the jury and the recovery in this case might be referred to the general law of negligence which renders the master liable to the servant for the negligence of a reckless and incompetent fellow servant, knowingly employed by the master. But this ground of liability mentioned in the declaration (R. pp. 5 and 6) was abandoned by plaintiff. Not a word of testimony was offered to support it. It was never referred to afterwards. The instructions

for the plaintiff which are supposed under the Mississippi practice, to present the plaintiff's theory of the case, make no mention of this ground of liability. The only instruction which does suggest the ground of liability upon which the jury is expected to act is the second one. (R. p. 43). And it calls the attention of the jury to the negligence of the engineer operating the locomotive. This is the issue upon which the case was tried. It is the issue and the only issue which evidence was offered to prove. The case was tried upon that issue and no other. Instruction No. 1 for the plaintiffs told the jury that it was not incumbent upon the plaintiff to establish by evidence every ground upon which they had counted in their declarations. One was enough. Plaintiff sought to establish but one. If the engineer was negligent or reckless even on this occasion it could not be concluded from that single default that he was a reckless and incompetent man, and that the company knew about his character and kept him in its employment after having knowledge of his dangerous character. We should not like to have to defend any such holding by the highest court of our state. Our court does say incidentally that the finding of the jury might have been rested upon this ground. But the truth is it was not based upon this ground. This remark of the supreme court of Mississippi was mere dictum; a mention of a possible ground of recovery which had occurred to pliantiff in this trial court but which had been abandoned. The issue as to whether the master was negligent in the employment of this engineer was not involved in the trial of the case; it could not be injected into it by the appellate court. It was not involved. It was not necessary to be decided. The issue, which was tried, submitted to the jury and decided by the jury was whether the engineer was negligent in running his train at the speed at which it was run. This involved section 193 of the constitution and section 3559 of Code of 1892 since the section foreman killed and the engineer were fellow servants in different departments of labor. When we try the case upon this issue and properly raise the question in the trial court as to the constitutionality of these provisions, the appellate court cannot by its decision of the case lug into the record another issue which might have been tried and might have been submitted to the jury and **might have been decided against the railroad company.**

If a court could hold that one act of negligence on the part of an employe might warrant the finding that he was a reckless and incompetent person and that the master was acquainted with his character certainly no court could say that such proof of one act of recklessness is conclusive of his character and of the employer's knowledge. The supreme court of Mississippi decided no such unreasonable thing. The remarks of the learned chief justice on this question were wholly unnecessary, were outside the record, were dicta. The issue mentioned was not in the case though it might at the proper time have been put into the case. The question emphasized by the court was as to the constitutionality of section 193 of the constitution as written into the statute, section 3559 of the code.

II.

The second non-federal ground claimed is the presumption authorized by section 1985 of Code of 1906. But in the first place nobody knows what the verdict of the jury might have been if it had not been instructed that the deceased was a favored employe under our laws. And in the second place we attack said section 1985 as being itself repugnant to the fourteenth amendment. If either of our federal questions was improperly decided counsel for defendants in error cannot find any resting place upon non-federal ground which the jury might have alighted upon in indulging in said presumption of liability under the said section 1985.

III.

The motion to dismiss attacks our second federal question claimed, not on the ground that there is no merit in it but on the ground that this point is not presented by the record. We are insisting that section 1985 of the Mississippi Code of 1906 as construed for the first time in this case is violative of the 14th amendment. While the chief justice mentions this statute as furnishing another non-federal ground upon which the verdict of the jury might be based, it is said here now that we did not in the trial court, make the point that this section of the code is repugnant to any provision of the federal constitution. But the construction of this statute of which we specially complain was first given to it by the supreme court of Mississippi in this

case. We could not have complained before because the specific objection would not have been pertinent before. We did raise the question by suggestion of error in the appellate court, and this suggestion of error was filed under the rules of the court, within the time allowed by the rules, and was overruled. The question was raised as soon as the ground of the objection came into existence. It is true that the state court in passing upon the suggestion of error refused to take up and discuss the constitutional question, although this was the main question presented by the suggestion of error. The refusal to decide the question will not prevent this court from considering it.

Chapman v. Crane, 123 U. S., 540, 31 L. Ed., 235;
Sayward v. Denny, 158 U. S., 39 L. Ed., 941;
Chicago, etc., Ins. Co. v. Needles, 113 U. S., 574, 28 L. Ed., 1084.

We recognize too the general rule that a question raised **on application for rehearing** is raised too late. Our practice, however, allows applications for rehearing and also suggestions of error. The points made by a suggestion of error in the supreme court of Mississippi, filed within the time allowed by the rules of the court, **are always** considered and decided. See Rule 10 of Rules of Supreme Court, 70 Miss., p. xxii.

It has been held that if the federal question is actually entertained and decided, even on application for rehearing, it may be considered here.

Leigh v. Green, 193 U. S., 379, 48 L. Ed., 623;
Missouri K. & T. R. R. Co. v. Elliott, 184 U. S., 530, 46 L. Ed., 673;
Mallett v. North Carolina, 181 U. S., 589, 45 L. Ed., 1915.

These decisions only recognize the rule that this court will review only such questions as have been raised and decided in the highest court of a state. And such review may be asked here if it is made to appear that the points were decided in the state court, or were considered or were properly presented for consideration by that court, although they might have been ignored. Our practice is for all suggestions of error to be considered. There is no necessity to get leave to file a suggestion

of error. Every such submission of questions to the supreme court of the state within the time allowed is proper and the questions proposed are considered. See the following cases in which suggestions of error are considered:

Y. & M. V. R. R. Co. v. Martin, 47 So. Rep., 667; 48 So. Rep. 739.

Moss Point Lumber Co. v. Harrison Co., 89 Miss., 448.

Parker v. Payne, 48 So. Rep., 835.

Levis-Zukoski & C. Co. v. McIntyre, 47 So. Rep., 666.

The court had so fully considered this section 1985 in its original opinion it was not thought necessary to take it up again for discussion on the suggestion of error. But the suggestion of error was considered and the question was raised in that manner properly. And, besides, as above suggested the question had first been injected into the case by the opinion of the court, giving this peculiar construction to the statute.

As to the merit of our contentions respecting the character of these two statutes we refer the court to our brief on the merits which is now on file. We are very much in earnest in making these contentions and it is not our purpose to annoy this court with questions previously decided. As to the fellow servant statute we have insisted (1) that such regulations are for the benefit of those employes only who are engaged in the dangerous part of railroading and that trackmen are engaged in no such dangerous work the decisions of certain state courts to the contrary notwithstanding, this court having never decided whether such statutes may be extended so far as to include persons who are not actually in a dangerous employment. And (2) that even though a section hand is engaged in work inherently dangerous because his work confines him to the track, this is not true of the section foreman who can stand away from the track if he prefers; and (3) that if trackmen are embraced in the said special provision they cannot recover unless they were about the work at the time or the accident grew out of their work.

And then we have undertaken to show the unconstitutionality of said section 1985 of the Code insisting that it is based upon an arbitrary classification,—that the peculiar difference between railroad operation and other businesses affords no

ground for a classification upon which special laws are to be based whose purposes are to make them liable in cases where other defendants would not be liable under similar conditions and to make it easier to prove cases against them.

J. N. Flowers

Against the Motion.

No. 59.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

[redacted]

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY,
Plaintiff in Error.

vs.

J. A. TURNIPSEED, ADMINISTRATOR OF THE ESTATE OF HAY HICKS AND MARY ALICE HICKS AND NEXT FRIEND OF BERNIE MARY HICKS, ET AL.
Defendant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY,
Plaintiff in Error.

Versus

J. A. TURNIPSEED, ADMINISTRATOR OF THE ESTATE OF RAY HICKS AND MARY ALICE HICKS AND NEXT FRIEND OF MINNIE MARY HICKS, ET AL.

MOTION TO DISMISS OR TO AFFIRM, WITH DAMAGES.

Now comes the Appellee, J. A. Turnipseed, Administrator aforesaid, by his counsel appearing in that behalf, and moves the Court to dismiss (with allowance of damages) the above entitled cause for want of jurisdiction in the Supreme Court of the United States to review the same, for the following reasons:

1. No Federal question is really involved on this appeal, or was in any way involved in the decision of this cause by the State Supreme Court below. While the assignment of errors in the appeal by the railroad company from the State Supreme Court below to this Court recites that the said State Court erred in holding sec. 193 of the State Constitution of 1890 not to be in conflict with the 14th Amendment to the United States Constitution, yet this alleged assignment, in so averring, presents an attempted Federal question which is merely colorable and not substantial. The opinion of the Supreme Court below (delivered by Mr. Chief Justice Whitfield) distinctly says: "There is really no question of the construction of sec. 193 of

the State Constitution involved, but a mere question arising under the ordinary general laws of negligence."

2. The appeal is frivolous, and was evidently taken for the purpose of securing delay.

3. The alleged assignment by the appellant railroad company that sec. 3559 of the Mississippi Code of 1892 (a rescript of sec. 193 of the Mississippi Constitution of 1890) was held by the State Supreme Court below not to be violative of the 14th Amendment to the United States Constitution can give no jurisdiction of this cause to the United States Supreme Court, as the recovery of the judgment appealed from in this cause was based upon the negligence and liability of the railroad company existing otherwise than under Code 1892, sec. 3559.

4. No jurisdiction of the Supreme Court of the United States can be invoked under the assignment of errors by the appellant railroad company that Mississippi Code 1906, sec. 1985 (declaring that in all actions against railroad companies for damages done to person or property, proof of injury inflicted by the running of the locomotive or cars of the company shall be prima facie evidence of negligence on the part of the servants of the company) on the ground alleged in the assignment that the State Supreme Court below erred in not holding it in conflict with the 14th Amendment to the United States Constitution, for the reason that this point was not raised by appellant in the court below; furthermore the opinion of the State Supreme Court does not show any such holding as is assigned now by the Appellant.

And the said appellee, by counsel aforesaid, also moves the Court to affirm said judgment from which the writ of error purports to have been taken by appellant, because, as herein above stated, it is manifest that appeal to this Court from the State Supreme Court below was obtained only for delay.

C. H. ALEXANDER,

Counsel for Appellee

for the purpose of this motion.

To MESSRS. J. N. FLOWERS AND MAY, FLOWERS & WHITFIELD, ATTORNEYS OF RECORD FOR THE APPELLANT:

Please take notice that on the 7th day of November, A. D., 1910, at the opening of the Supreme Court of the United States, or at as early an hour thereafter as may be permissible, the motion of which the foregoing is a **copy** will be submitted to the Supreme Court of the United States for the decision of the Court thereon. Annexed hereto is a copy of my brief and argument in support of said motion.

C. H. ALEXANDER,

Attorney for Appellee.

October 11, 1910.

ARGUMENT.

The opinion of the Supreme Court below (**Mobile. etc. R. R. Co. v. Hicks et al.,** 91 Miss. 351; 46 South Rep., 360; 124 Am. St. Rep., 679, sets forth fully the facts in this case.

The decedent, Ray Hicks, a section foreman in the appellant railroad company's employ, in October, 1905, while standing near the newly built and unballasted railroad track, was killed by the derailment of a mixed passenger and freight train (being the first train carrying passengers ever run over the road) as it was passing him at nearly three times its schednle rate of speed. As stated in the opinion of Mr. Chief Justice Whitfield of the State Supreme Court below: "The facts sufficiently showed that the decedent's death was due to the incompetency of the enginerr of the train, for which the railroad company was liable" (see syllabus one of the reported case, 91 Miss., 273). His widow and children sued as the legal representatives of the decedent, and the widow also sued as his administratrix for damages sustained by the decedent himself, and these two suits were consolidated, and in the State Circuit Court of Newton County, Mississippi, there was a verdict against the railroad company for $7,500.00. The railroad company appealed to the State Supreme Court, and the judgment of the lower trial Court was by the State Supreme Court affirmed. (Pending the appeal, Mrs.

Hicks died, and Mr. Turnipseed, administrator, was substituted as a party in lieu of her. Record, page 51.)

Probably anticipating the affirmance of the judgment of the trial court, learned counsel for the railroad company sought, in the State Supreme Court to attack the validity of sec. 193 of the Mississippi Constitution of 1890 (abrogating the fellow servant rule with reference to certain employes of railroad corporations injured as a result of the negligence of certain other fellow servants) as being in conflict with the Fourteenth Amendment to the United States Constitution. And now in the Supreme Court of the United States, it is assigned as an error on the part of the State Supreme Court below, by the appellant railroad company (First Assignment of Error, page 80, of Record) that "the Court erred in holding that sec. 193 of the Mississippi Constitution of 1890 . . . . . is not in conflict with the Fourteenth Amendment to the United States Constitution, and that it does not deny to railroad corporations the equal protection of the laws.'

This sec. 193, of the State Constitution of Mississippi is copied into the statute law of Mississippi in Annoted Code of Mississippi of 1892, section 3559. And the said Assignment of Error of the appellant railroad company, as its second ground of error, alleges that the said statute, Code 1892, section 3559, is, for the same reason, unconstitutional as conflicting with the Fourteenth Amendment of the United States Constitution.

While the learned Chief Justice Whitfield, of the State Court below, delivered a very exhaustive opinion in regard to sec. 193, of the Mississippi Constitution, in this case, and while the Mississippi Supreme Court below held herein that sec. 193 of the Mississippi Constitution did not conflict with the Fourteenth Amendment aforesaid (and while we think that this present high tribunal will uphold the views of the Mississippi Court as to the same), yet it is to be noted—and we base our motion for a dismissal or affirmance on the following—that the Mississippi Supreme Court, in the opinion, distinctly says that **"No question of the construction of section 193 of the State Constitution is involved."** Hence, as no Federal question is here concerned, the United States Supreme Court has no jurisdiction.

In the reported case (91 Mississippi Reports) on page 355 of the 91 Miss. Rep., the Court below said: "The second contention of learned counsel for appellant is that, because no evidence was offered in support of any allegation upon which the claims are based, except **the one** to the effect that the engineer was running at a dangerous rate of speed, Code 1892, section 3559, under which the suit by the administratrix was brought, is violative of the Fourteenth Amendment of the Federal Constitution. Our first observation with regard to their contention is that it incorrectly states the facts in this: That this action by the administratrix is necessarily bottomed, not only on the negligence of the engineer in running at an excessively dangerous rate of speed, wantonly and wilfully, but, as a necessary corollary of this, upon the negligence of the master in having in its employ this utterly incompetent engineer." And, on page 357, ib., the opinion further states: ". . . . . It is manifest that there is really no question of the construction of sec. 193 of the State Constitution involved, but a mere question arising under the ordinary general law of negligence, and we have fully covered this in what we have above said. We may add to this the further statement that the verdict may be properly referred to the general presumption of negligence created by Mississippi Code 1906, section 1985, which is as follows: 'In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of the company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company with reference to such injury. This section shall also apply to passengers and employes of railroad companies.' "

We accordingly contend that no Federal question is involved in the decision of the case. It is too well settled, to need reference to authorities, that a Federal question must exist, and must be more than merely colorable, to give this high tribunal jurisdiction. Even if section 193 of our State Constitution were involved, our State Supreme Court has construed section 193 as embracing within its protection an employe working as Hicks was working and injured as he was injured, hence there could then be no Federal question since the Federal Courts are bound by the construction given by the State Court to our State Con-

stitution. On page 359 of the printed Mississippi Report (91st Miss.) it is stated: "He is clearly within the reason and spirit of the presumption of Code 1906, section 1985 under section 193 of the State Constitution." (See also 5th syllabus of the printed report, 91 Miss., page 274.)

2. The appeal is frivolous. The United States Supreme Court has time and again passed upon the validity of statutes and State Constitutional requirements similar to sec. 193 of the State Constitution (same as Code 1892, section 3559). See **Missouri R. Co. v. Mackey,** 127 U. S., 210; **Gulf etc. R. Co. v. Ellis,** 165 U. S., 155; **Tullis v. Lake Erie etc. R. Co.,** 175 U. S., 348; **Berea College v. Kentucky,** 211 U. S., 45.

As said by Mr. Chief Justice Whitfield in **Ballard v. Oil Co.,** 81 Miss., page 557 (middle of page): Section 193 of the Constitution was adopted after the decision of the United States Supreme Court in **Missouri etc. R. Co. v. Mackey,** 127 U. S., 205, and was manifestly intended to authorize legislation along the lines held constitutional in that case."

3. Code 1892, section 3559, is a rescript of section 193, of our State Constitution of 1890, hence the averments hereinbefore with regard to section 193 of the State Constitution are applicable to said statute.

4. The third Assignment of Error set up by learned counsel for appellant is that section 1985, of the Code of 1906, was held by the State Supreme Court below to be not unconstitutional; that is, not in conflict with the Federal Constitution. This point is not shown to have been raised in the court below, hence cannot be assigned as a ground of error now before the Supreme Court of the United States.

But if it were, this Court would not now take jurisdiction because thereof, it having no power to review the decisions of the State Courts in the matter. The proper construction to be given to a state statute in itself involves no Federal question, but is exclusively for the State Court to determine. **Phoenix Ins.**

Co. v. Gardiner, II Wall., 204; **Bank v. Buckingham,** 5 How., 317; **McNulty v. California,** 149 U. S., 645.

Hence, for the reasons hereinbefore stated, this appeal or writ of error should be dismissed. And as this cause is brought here by writ sued out in disregard of the law as already settled by precedents of this Court (**Pennywit v. Eaton,** 15 Wall., 380, 382), and merely for delay, it is meet that the Court should, under the 23rd rule of this Court, award ten per centum damages on the amount of the judgment appealed from, or proper and just damages for the delay. **Phelps v. Edgerton,** 131 U. S. appx. lxxi; 16 L. Ed., 749; **Nelson v. Flint,** 166 U. S., 276, 280; **Hall v. Jordan** 19 Wall., 271, 22 L. Ed., 47.

Respectfully submitted,

C. H. ALEXANDER,

Counsel for Appellee.

CHALMERS ALEXANDER,

Of Counsel for Appellee.

Jackson, Miss., October 11, 1910.

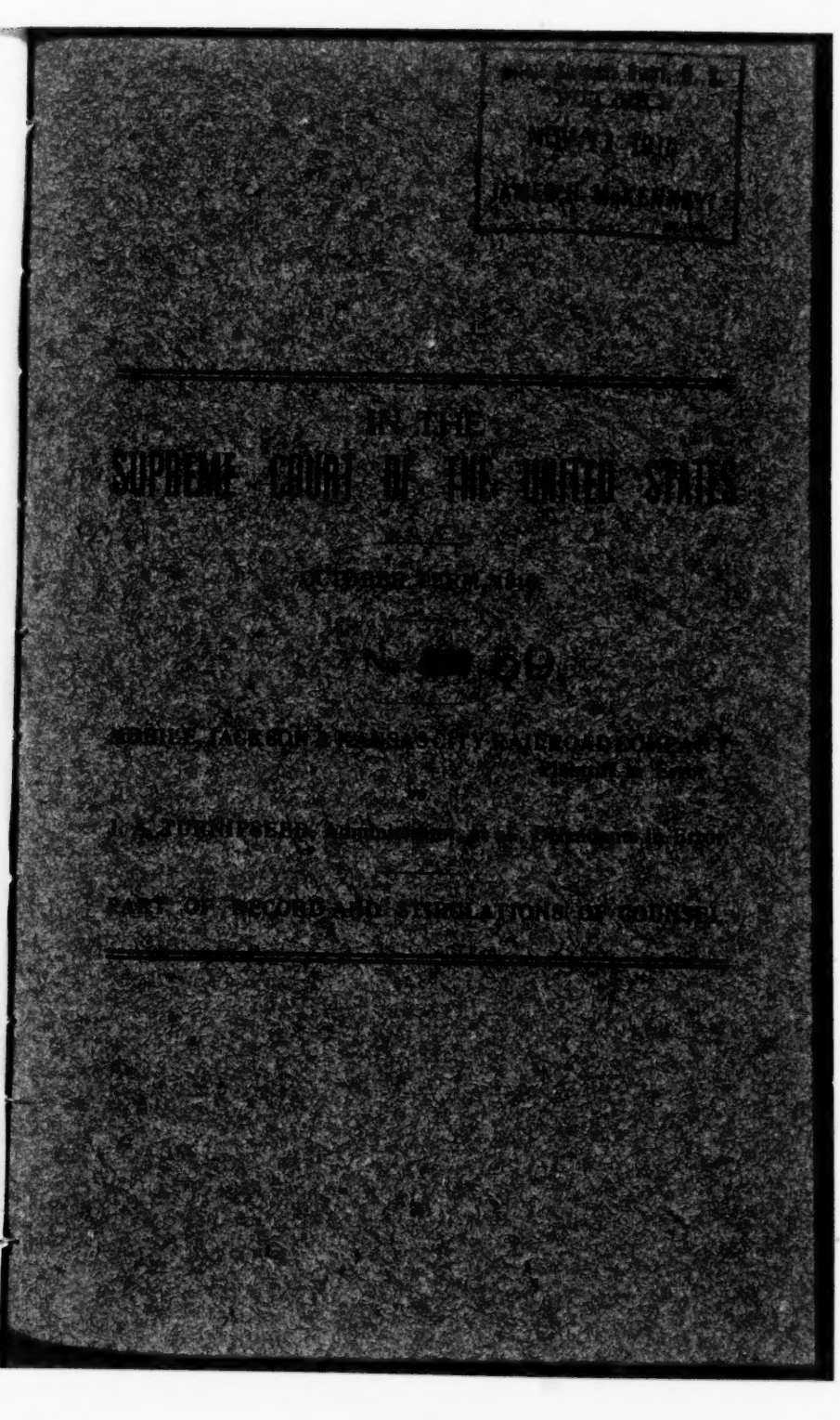
We acknowledge receipt of a copy of the foregoing motion and brief of counsel for appellee, this 11th day of October.

J. N. FLOWERS,

MAY, FLOWERS & WHITFIELD.

Counsel of Record for the Appellant,

M. J. & K. C. R. R. Company.



IN THE SUPREME COURT OF MISSISSIPPI

OCTOBER TERM, 1907.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY

vs.

MARY ALICE HICKS, Administratrix.

NO. 12,839.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY

vs.

MARY ALICE HICKS, et al.

ASSIGNMENT OF ERRORS.

Comes the appellant by its attorneys and assigns the following errors committed by the trial court as shown by the record.

1. The court erred in overruling the demurrer to the declaration in the case of Mary Alice Hicks vs. appellant.

2. The court erred in overruling the demurrer to the declaration in the case of Mary Alice Hicks, et al, vs. appellant.

3. The court erred in sustaining the motion made by the plaintiffs to consolidate the two causes of action.

4. The court erred in forcing the defendant to go to trial on both cases at the same time.

5. The court erred in admitting testimony offered by the plaintiffs over the objection of the defendant as shown by the stenographer's notes.

6. The court erred in overruling the motion made by the defendant at the conclusion of plaintiff's testimony to exclude the evidence offered by plaintiffs and for a peremptory instruction for the defendant.

7. The court erred in excluding testimony offered by the defendant upon the objection of the plaintiffs.

9. The court erred in refusing instructions Nos. 1, 2 and 3 asked by the defendant.

10. The court erred in modifying instruction No. 4 asked by the defendant.

11. The court erred in overruling the defendant's motion for a new trial.

MAY, FLOWERS & WHITFIELD,
Attorneys for Appellant.

Oral argument desired.

We hereby cettify that we have this day mailed to Alexander & Alexander a copy of this assignment of errors.

This, Oct. 4, 1907.

MAY, FLOWERS & WHITFIELD.

STATE OF MISSISSIPPI,
HINDS COUNTY.

I, GEO. C. MYERS, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the assignment of errors in the case of Mobile, Jackson & Kansas City Railroad Company vs. Mary Alice Hicks, Administratrix, and Mobile, Jackson & Kansas City Railroad Company vs. Mary Alice Hicks, et al., No. 12839, on the docket of said court as the same appears of record on file in my office.

GIVEN under my hand with the seal of said Court affixed, at office, in the City of Jackson, this the 7th day of November, A. D., 1910.

SEAL.

GEO. C. MYERS, Clerk.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 241.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY
Plaintiff in Error,

vs.

J. A. TURNIPSEED, Administrator, et al., Defendants in Error.

AGREEMENT.

It is agreed by and between counsel for the parties to this cause in this court as follows:

1. That a certified copy of the assignment of errors filed in the supreme court of Mississippi on appeal to that court may be filed in this court and be considered as part of the record herein.

2. That this cause may be submitted on briefs when the same shall be reached on the call of the docket provided the court will grant leave to defendants in error to file their brief within 10 days from this date and to counsel for plaintiff in error to file a rejoinder brief within 15 days from this date.

This, November 7, 1910.

Counsel for Plaintiff in Error.

Counsel for Defendants in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. [redacted] 59.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY,
Plaintiff in Error.

Versus

J. A. TURNIPSEED, ADMINISTRATOR OF THE ESTATE OF RAY HICKS AND MARY ALICE HICKS AND NEXT FRIEND OF MINNIE MARY HICKS, ET. AL.
Defendant.

BRIEF ON MERITS

For Appellee,

By C. H. ALEXANDER.

HEDERMAN BROS., JACKSON

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY,

Plaintiff in Error.

Versus

J. A. TURNIPSEED, ADMINISTRATOR OF THE ESTATE OF RAY HICKS AND MARY ALICE HICKS AND NEXT FRIEND OF MINNIE MARY HICKS, ET. AL.

Defendant.

BRIEF FOR THE APPELLEE.

The opinion of the Supreme Court below (Mobile etc. R. R. Co. v. Hicks et al. 91 Miss., 351:46 South Rep. 260;124 Am. St. Rep. 679) sets forth fully the facts in this case. We have also, in a motion filed by us to dismiss or affirm this case, recited the facts. It is sufficient here to say that the decedent, Ray Hicks, a section foreman in the appellant railroad company's employ, in October, 1905, while standing near the railroad company's newly built and unballasted railroad track, was killed by the derailment of a mixed passenger and freight train (being the first train carrying passengers ever run over the road) as it was passing him at nearly three times its schedule rate of speed. As stated

in the opinion of Mr. Chief Justice Whitfield of the State Supreme Court below: "The facts sufficiently showed that the decedents's death was due to the incompetency of the engineer of the train, for which the railroad company was liable" (see syllabus one of the reported case, 91 Miss., 273). His widow and children sued as the legal representatives of the decedent, and the widow also sued as his administratrix for damages sustained by the decedent himself, and these two suits were consolidated, and in the State Circuit Court of Newton County, Mississippi, there was a verdict against the railroad company for $7,500.00. The railroad company appealed to the State Supreme Court and the judgment of the lower trial court was by the State Supreme Court affirmed.. (Pending the appeal, Mrs. Hicks died, and Mr. Turnipseed, administrator, was substitutd as a party in lieu of her. Record page 51.)

We are confident that this court will sustain our motion, heretofore filed, to dismiss or affirm this case, inasmuch as it is apparent that there is no jurisdiction in the Supreme Court of the United States to review the decision of the State Supreme Court below. No federal question here is involved. The attempeted Federal question is not substantial.

I

We however now, in this short brief, answer the argument set forth in the brief of learned counsel for the appellant railroad company. The first contention of opposing counsel is that section 193 of the Mississippi Constitution of 1890 (written into the statute law of Mississippi as section 3559 of the Annotated Code of 1892), as construed in this special case by the Mississippi Supreme Court, violates the fourteenth amendment of the United States Constitution in that it denies to the appellant, as a railroad corporation, the equal protection of the law. It will be noted that opposing counsel do not contend for the general proposition that section 193

of the Mississippi Constitution is in violation of the fourteenth amendment of the Federal Constitution, but it seems to be the contention merely that, as the Supreme Court of Mississippi in this case has construed the said section 193 as applicable to the decedent, Ray Hicks, such construction is so forced and distorted as to injure the constitutional rights of the Mobile, Jackson & Kansas City R. R. Co. Opposing counsel distinctly states that the Mississippi court, in former decision has shown that the said section 193 of the Mississippi Constitution is strictly in line with requirements of the Maskey case, 127 U. S., 205, and the **Tullis case**, 175 U. S., 351. Opposing counsel accordingly impliedly concede that the only hope of injection of a Federal question into this case on the present appeal is through the improbable interpretation on the part of the Supreme Court of the United States that the Supreme Court of Mississippi wrongly decided the legal relationship of the decedent, Hicks, under section 193 of the Mississippi Constitution Now, this Court knows too well for there to be any need of citation of authorities that the Federal Courts are bound by the construction given by state courts to state constitutions and state statutes. In other words, this Court will be bound, and is bound, by the decision of the Mississippi Supreme Court in its decision that section 193 of the Mississippi Constitution is to be construed as embracing within its protection an employe working as Hicks was working when inqured. The proper construction of state legislation being a question of local and not of Federal law, the decision of a state court thereon is not subject to review by the Federal Supreme court on writ of error to that court.

Great Western Tel. Co. v. Purdey, 162 U. S.329.
Lombarb v. West Chicago Park, 181 U. S., 33.
Smiley v. Kansas, 196 U. S., 447.
Gatewood v. North Carolina, 203 U. S., 531.

The construction given by the highest state court to its own Constitution is conclusive on the Federal Su-

preme Court in determining its validity under the Federal Constitution on writ of error to such court.

Manley v. Clark, 187 U. S., 547;
West v. Louisiana, 194 U. S., 258;
Campbell v. California, 200 U. S., 87;
Minneapolis R. R. Co. v. Minnesoto, 193 U. S., 53

Accordingly, since opposing counsel do not seem to be contending that section 193 of the State Constitution as written, is violative of the Federal Constitution, but seem instead to be contending that the construction placed by the state court below on the relationship of the employe, Hicks, to the railroad company infringes upon the legal rights of the railroad compnay under the Federal Constitution, this case must be dismissed.

II

But passing on beyond this, we call the attention of the Court to the fact (already set forth in our motion to dismiss this case) that, as distinctly stated by Mr. Chief Justice Whitfield, on page 357 of the opinion in this case in volume 91 of the Mississippi reports, "**there is really no question of the construction of section 193 of the State Constitution involved, but a mere question arising under the ordinary general laws of negligence.**" This case does not stand merely upon section 193 of the Mississippi Constitution. Even if the section of the constitution had never been framed, the railroad company for the injury to the decedent would have been liable, and appellee could have sued under Lord Campbell's Act. The death of the decedent was shown under the evidence to have resulted from the gross negligence of the master in that the engineer allowed the mixed train, whose regular schedule was only 15 miles an hour, to be run, over a raw track, unballasted, and freshly built, at the violent rate of between 30 and 40 miles an hour. Even if these facts, as passed upon by the jury, would not have made the railroad company liable under the general law of negligence, the company must be

liable under section 1985 of the Mississippi Code of 1906 providing that injury to persons or property by railroads shall be prima facie evidence of want of skill, etc. In other words, as decided by our Mississippi State Court, the liability of the railroad company exists otherwise than by virtue of section 193 of the State Constitution. Mr. Chief Justice Whitfield state that the decedent was killed by one of the cars of the train, and cites the doctrine of "res ipsa loquitur." (See page 456 of the opinion in volume 91 of Mississippi Reports.) He further states that, with reference to section 1985 of the Code 1906, in reference to presumption of want of skill, "the verdict here is maintainable under the presumption created by this statute. Page 357 of 91 Miss.) In the case of **Berea College v. Kentucky**, 211 U. S.. 45, this court has held that when a state court decides a case upon two grounds, one Federal, and the other non-Federal, this court will not disturb the judgment if the non-federal ground, fairly construed, sustains the decision. Mr. Justice Brewe cites several cases in his opinion in aid of this averment. See the following cases:

Murdock v. Memphis, 20 Wall, 590, 636.
Eustis v. Bolles, 150 U. S., 361.
Giles v. Teasley, 193 U. S., 146, 160.
Allen v. Arguimbau, 198 U. S., 149.

III

But passing on further, we take issue with the contention of opposing counsel that the work in which Hicks was engaged was not such as habitually placed him within the hazards contemplated by the Mississippi Constitution. It is true that the telegraph operator and the train dispatcher are not in business as "inherently dangerous" as switchmen, hostlers and brakemen. But certainly Ray Hicks, whose business carried him constantly with his gang up and down the railroad track, was subject to as many dangers as could be contemplated by the **Mackey case** and **Tullis case** and by the

framers of our State Constitution under the learning imputed to them in the **Ballard case**, 81 Miss., 507 and the **Bradford Construction case**, 88 Miss., cited by opposing counsel. Hicks' job was dangerous. Hicks actually got killed while in the line of his employment. The opinion of Mr. Chief Justice Whitfield discussed this point. In addition to the citations in his opinion we refer to the following decisons:

Keatley v. I. C. R. R. Co., 103 Iowa, 282.
Haden v. R. R. Co., 92 Iowa, 227.
Dunn v. Chicago R. R. Co., 130 Iowa, 580.
Jenning v. R. R. Co., 1 L. R. A., (N. S.) 702.
Williams v. R. R. Co., 121 Iowa, 270.
Croll v. Atchison R. R. Co., 57 Kansas, 548.

Under the decision of the State Supreme Court below the briefs of counsel for the appellant and for the appellee respectively were printed in full in the reported case, and these citations, together with a more general argument of the phase of the case, will be found in 91 Miss. Rep.

We retietrate that wheras our State Supreme Court, dealing with its own State Constitution, has distinctly held in this case that the decedent, Hicks, as a railroad section foreman, was within the class of employes entitled to the benefit of section 193 of the State Constitution and to the benefit of Mississippi Code of 1892, section 3559, this present Federal tribunal cannot hold differently. See the fifth syllabus on page 274 of this case as reported in 91 Miss. Rep.

IV.

The only other contention of opposing counsel, in the attempt to have this Court assume jurisdiction, is that section 1985 of the Mississippi Code of 1906 is in conflict with the Federal Constitution. This Mississippi statute provides that in all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomo-

tives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury; this section being applicable to employes. Opposing counsel say that this statute places a burden upon railroads which is put upon no other class of litigants. It will be noted that the staute is applicable only where the proof of injury results from two things: (1) locomotives or cars (2) being run or operated in motion. This statute is applicable to all railroad companies, hence there is no injustice in the operation of the statute. **Florida** has a similar statute; see section 3148 of the general statutes of Florida in Code 1906. **South Carolina** has a similar statute, as shown in note on page 1274 of 33 Cyc. **Arkansas** has a similar statute; Sand. & H. Dig. section 6349, referred to in Little Rock R. R. Co., v. Blewitt, 65 Ark., 235. **Georgia** has a similar statute. It is important here to note that the Supreme Court of Georgia has passed upon the Federal constitutionality of such statute. See 73 Ga., 499; 79 Ga., 305. **Alabama** has a similar statute. See Ga. Cen. R. R. Co., v. Turner, 145 Ala., 441. So has **North Carolina.** 120 N. C. 489. So has **Tennessee**, as shown in Horn v. R. R. Co., 1 Coldw. 72. In fact **Colorado, Kentucky, Maryland, Louisiana, North Dakota** and other states are like Mississippi in this respect. See the numerous citations in 33 Cyc., 1274.

Practically every state has statutes in regard to presumptions of negligence against railroad companies arising from fires near the right of way. Inasmuch as a whole class is affected by such decisions, and not merely some members of such class there is nothing unconstitutional in such statutes.

V.

While the matter may be here immaterial, it may be stated incidentally that there are several cases reported in our Mississippi Reports showing injuries resulting

from the fact that a car of a moving train left the track. Hence there is constant danger to those whose business as employes causes them to work, as did Hicks, near the track. See **Brown v. Yazoo etc. R. R. Co.**, 88 Miss., 687 wherein the Mississippi Supreme Court held that the fact that the car left the rails proved **prima facie** a defect in the rails or wheels, under the doctrine of res ipsa loquitur.

We accordingly close with the reiteration that this Federal Court will find nothing upon which to entertain jurisdiction in this case. The appeal is frivolous. It was evidently taken by the railroad company solely for the purpose of delay. It has been several years since the verdict in the trial court below. The beneficiaries of the judgment are shown of record to be helpless infants. It is accordingly proper that this Court, in dismissing this appeal, should award damages in favor of the administrator, as prayed for in the motion on file in this cause.

C. H. ALEXANDER, for Appellee.
CHALMERS ALEXANDER, Of Counsel.

We acknowledge receipt of a copy of the foregoing brief of counsel for the appellee, J. A. Turnipseed, Administrator, this 5th day of November, 1910.

J. N. FLOWERS,
Attorney for the Mobile, Jackson & Kansas City R. R. Co., Appellant.

fected is afforded reasonable opportunity to submit to the jury all the facts on the issue.

It is not an unreasonable inference that a derailment of railway cars is due to negligence in construction, maintenance or operation of the track or of the train, and the provisions of § 1985 of the Mississippi Code of 1906, making proof of injury inflicted by the running of cars or locomotives of a railway company *prima facie* evidence of negligence on the part of servants of the company, does not deprive the companies of their property without due process of law or deny to them the equal protection of the law.

Such a statute in its operation only supplies an inference of liability in the absence of other evidence contradicting such inference.

THE facts, which involve the constitutionality under the equal protection clause of the Fourteenth Amendment of certain provisions of the Code and of the constitution of the State of Mississippi, are stated in the opinion.

Mr. James N. Flowers for plaintiff in error:

Section 3559, Annotated Code, as now construed by the Supreme Court of Mississippi, violates the Fourteenth Amendment in that it denies to railroad corporations the equal protection of the laws. Said section is constitutional as construed by that court in *Ballard* v. *Cotton Oil Co*, 81 Mississippi, 507, and *Bradford Construction Co.* v. *Heflin*, 88 Mississippi, 362. That state statutes may abolish the fellow-servant rule in part as to employés of railroad companies and leave it in full operation as far as it affects the rights of servants of other masters is conceded, *Minneapolis &c. Ry. Co.* v. *Herrick*, 127 U. S. 210; *Tullis* v. *Lake Erie &c. Ry. Co.*, 175 U. S. 348; *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205; *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150, but they can do so only as to such employés as are emperilled by the hazardous nature of the business of operating railroad trains. A trackman is in no more danger from the operation of trains than is a telegraph operator.

The statute cannot be consistently applied to the case

of employés, except those who take part in the actual operation of trains, or whose duties expose them to dangers from the actual operation of trains. The dangerous part of the railroad business, which justifies the classification of it as a dangerous business, is the running of trains. The statute only applies to those who take part in such dangerous business, or whose duties expose them to such dangers.

To determine whether the person injured is entitled to the protection of § 193 of the state constitution, one should not look at the character of the employment of the person whose negligence caused the injury, but to the character of the employment of the person who was himself injured.

In this case the man killed was engaged in no dangerous business. His injuries did result from a running train, the said train having been derailed and turned over on him.

The deceased was not even engaged about the duties of his employment at the time he was hurt, but had stopped at the noon hour and was walking along the track. His duties did not require him to be where he was. It was a place of his own selection. He cannot be said to have been engaged in a dangerous employment just because he worked on the track and a train running along the track might jump the track and fall on him. *Railway Co.* v. *Mackey, supra; Tullis* v. *Railroad Co.*, 175 U. S. 351; *Blomquist* v. *Great Northern R. R. Co.*, 65 Minnesota, 69; *Jemming* v. *Great Northern R. R. Co.* (Minn.), 1 L. R. A. (N. S.) 702; *Anderson* v. *Railroad Co.*, 74 Minnesota, 432.

Cases allowing the railroad employé to plead such statutes have proceeded on the idea that the particular branch of employment was hazardous. *Railroad Co.* v. *Pontius*, 157 U. S. 200; *Dunn* v. *Railroad Co.*, 107 N. W. Rep. 616; *Callahan* v. *Railroad Co.*, 170 Missouri, 473, affirmed in 194 U. S. 826.

In the effort to make it easy to fasten liability upon

railroad companies the Mississippi legislature has gone to the extreme. The necessary effect of § 1985 of the Mississippi Code of 1906 is to make railroad corporations liable in every instance of damage to persons or property unless it is able to meet successfully the burden of proving its innocence. The burden of proof is shifted to the defendant and railroad corporations are put in a class to themselves. It is legislation directed specially against railroads. There is no reason in the classification. It is arbitrary and makes it easier to recover against railroad defendants than against any other defendants. It is a burden put upon them which is put upon no other class of litigants.

The inherent danger of railroading is not a matter to be taken into consideration in the enactment of rules of evidence or of law pertaining to the enforcement of rights of action for injuries inflicted by running trains. The "difference" between railroad companies and other persons and corporations in this regard does not bear a reasonable and just relation to the subject in respect of which the classification is proposed, and therefore such classification is arbitrary. *Atchison, T. & S. F. R. R. Co.* v. *Matthews*, 174 U. S. 96.

The statute, although upheld, was recognized as being on the border line; four members of this court condemned it. *Missouri Pacific R. R. Co.* v. *Humes*, 115 U. S. 512; *Railroad Co.* v. *Paul*, 173 U. S. 404, distinguished; and see *Ballard* v. *Oil Co., supra; Bradford Construction Co.* v. *Heflin, supra; Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150.

This statute will bear upon railroad companies in a discriminating and unequal way and deprive them of their property without due process of law. No law authorizing persons to recover of railroad companies on unjust and illegal claims can be justified on grounds of public policy.

Mr. C. H. Alexander and *Mr. Chalmers Alexander* for defendant in error:

The work in which Hicks was engaged was such as habitually placed him within the hazards contemplated by the Mississippi constitution. See cases in opinion of state court and *Keatley* v. *I. C. R. R. Co.*, 103 Iowa, 282; *Haden* v. *R. R. Co.*, 92 Iowa, 227; *Dunn* v. *Chicago R. R. Co.*, 130 Iowa, 580; *Jenning* v. *R. R. Co.*, 1 L. R. A. (N. S.) 702; *Williams* v. *R. R. Co.*, 121 Iowa, 270; *Croll* v. *Atchison R. R. Co.*, 57 Kansas, 548; *Brown* v. *Yazoo R. R. Co.*, 88 Mississippi, 687. It is applicable to all railroad companies, hence there is no injustice in the operation of the statute. For similar statutes see § 3148 of the general statutes of Florida, 1906. For Arkansas see Sand. & H. Dig., § 6349. For Georgia see 73 Georgia, 499; 79 Georgia, 305. For Alabama see *Georgia Cent. R. R. Co.* v. *Turner*, 145 Alabama, 441. For North Carolina, 120 N. C. 489. For Tennessee see *Horn* v. *Railroad Co.*, 1 Coldw. 72. For Colorado, Kentucky, Maryland, Louisiana, North Dakota, South Carolina and other States see the numerous citations in 33 Cyc. 1274.

Mr. Justice Lurton delivered the opinion of the court.

This was an action in tort for the wrongful killing of Ray Hicks, a section foreman in the service of the railroad company. There was a judgment for the plaintiff in a circuit court of the State of Mississippi, which was affirmed by the Supreme Court of the State.

The Federal questions asserted, which are supposed to give this court jurisdiction to review the judgment of the Supreme Court of the State, arise out of the alleged repugnancy of §§ 3559 and 1985 of the Mississippi Code to that clause of the Fourteenth Amendment of the Constitution which guarantees to every person the equal protection of the laws.

Section 3559 of the Mississippi Code of 1892, being a rescript of § 193 of the Mississippi constitution of 1890, abrogates, substantially, the common law fellow-servant rule as to "every employé of a railroad corporation." It is urged that this legislation, applicable only to employés of a railroad company, is arbitrary, and a denial of the equal protection of law, unless it be limited in its effect to employés imperiled by the hazardous business of operating railroad trains or engines, and that the Mississippi Supreme Court had, in prior cases, so defined and construed this legislation. *Ballard* v. *Mississippi Cotton Oil Co.*, 81 Mississippi, 532; *Bradford Construction Co.* v. *Heflin*, 88 Mississippi, 314.

It is now contended that the provision has been construed in the present case as applicable to an employé not subject to any danger or peril peculiar to the operation of railway trains, and that therefore the reason for such special classification fails, and the provision so construed and applied is invalid as a denial of the equal protection of the law.

This contention, shortly stated, comes to this, that although a classification of railway employés may be justified from general considerations based upon the hazardous character of the occupation, such classification becomes arbitrary and a denial of the equal protection of the law the moment it is found to embrace employés not exposed to hazards peculiar to railway operation.

But this court has never so construed the limitation imposed by the Fourteenth Amendment upon the power of the State to legislate with reference to particular employments as to render ineffectual a general classification resting upon obvious principles of public policy because it may happen that the classification includes persons not subject to a uniform degree of danger. The insistence, therefore, that legislation in respect of railway employés generally is repugnant to the clause of the Constitution

guaranteeing the equal protection of the law merely because it is not limited to those engaged in the actual operation of trains is without merit.

The intestate of the defendant in error was not engaged in the actual operation of trains. But he was nevertheless engaged in a service which subjected him to dangers from the operation of trains, and brought him plainly within the general legislative purpose. The case in hand illustrates the fact that such employés, though not directly engaged in the management of trains, are nevertheless within the general line of hazard inherent in the railway business. The deceased was the foreman of a section crew. His business was to keep the track in repair. He stood by the side of the track to let a train pass by; a derailment occurred and a car fell upon him and crushed out his life.

In the late case of *L. & N. Railroad* v. *Melton*, 218 U. S. 36, an Indiana fellow-servant act was held applicable to a member of a railway construction crew who was injured while engaged in the construction of a coal tipple alongside of the railway track. This whole matter of classification was there considered. Nothing more need be said upon the subject, for the case upon this point is fully covered by the decision referred to.

The next error arises upon the constitutionality of § 1985 of the Mississippi Code of 1906. That section reads as follows:

"Injury to Persons or Property by Railroads *prima facie* Evidence of Want of Skill, etc.—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employés of railroad companies."

The objection made to this statute is that the railroad

applied by the Mississippi court in this case is unobjectionable. It is not an unreasonable inference that a derailment of railway cars is due to some negligence, either in construction or maintenance of the track or trains, or some carelessness in operation.

From the foregoing considerations it must be obvious that the application of the act to injuries resulting from "the running of locomotives and cars," is not an arbitrary classification, but one resting upon considerations of public policy arising out of the character of the business.

Judgment affirmed.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY *v.* TURNIPSEED, ADMINISTRATOR.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 59. Submitted November 30, 1910.—Decided December 19, 1910.

A general classification in a state statute resting upon obvious principles of public policy does not offend the equal protection provision of the Fourteenth Amendment because it includes persons not subject to a uniform degree of danger.

An employé of a railway company, although not engaged in the actual operation of trains, is nevertheless within the general line of hazard inherent in the railway business.

A state statute abrogating the fellow-servant rule as to employés of railway companies is not unconstitutional under the equal protection provision of the Fourteenth Amendment because it applies to all employés and not only to those engaged in the actual operation of trains; and so held as to § 3559 of the Mississippi constitution of 1890.

Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact is within the general power of government to enact rules of evidence; and neither due process of law nor equal protection of the law is denied if there is a rational connection between the fact and the ultimate fact presumed, and the party af-